TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 336

LAKE SUPERIOR CONSOLIDATED IRON MINES, OLIVER IRON MINING COMPANY, NORTHERN DEVELOPMENT COMPANY, ET AL., APPELLANTS,

vs.

SAMUEL LORD, J. G. ARMSON, AND ODIN HALDEN, CONSTITUTING THE MINNESOTA TAX COMMISSION, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

FILED MARCH 30, 1925

(30,980)

(30,990)

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[fol. 1] [Caption omitted]

[fol. 2] **IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FIFTH DIVISION**

LAKE SUPERIOR CONSOLIDATED IRON MINES, a Corporation; OLIVER Iron Mining Company, a Corporation; Northern Development Company, a Corporation; Bishop Iron Company, a Corporation; Elba Iron Company, a Corporation, and Luzerne Iron Mining Company, a Corporation, Plaintiffs,

vs.

SAMUEL LORD, J. G. ARMSON, and ODIN HALDEN, Constituting the Minnesota Tax Commission; Clifford L. Hilton, Attorney General of Minnesota; R. P. Chase, Auditor of Minnesota, and Henry Rines, Treasurer of Minnesota, Defendants.

AMENDED BILL OF COMPLAINT—Filed April 2, 1924

The above named plaintiffs, for their amended bill of complaint and for their cause of action against the above named defendants, allege and show to the Court as follows:

1. That the defendants Samuel Lord, J. G. Armson and Odin Halden constitute the Minnesota Tax Commission of the State of Minnesota; that said Odin Halden is a resident and citizen of the County of St. Louis, defendant Samuel Lord is a resident and citizen of Dodge County, defendant J. G. Armson is a resident and citizen of Washington County, all of Minnesota, and defendants Clifford L. Hilton, R. P. Chase and Henry Rines are, respectively, Attorney General, Auditor and Treasurer of the State of Minnesota and are all resi-[fol. 3] dents and citizens thereof.

2. That the plaintiff Lake Superior Consolidated Iron Mines is and for more than thirty (30) years last past has been a corporation duly organized and existing under the laws of the State of New Jersey and qualified to do business in the State of Minnesota; that the plaintiffs Oliver Iron Mining Company, Bishop Iron Company and Elba Iron Company are and for more than twenty-eight (28) years last past have been corporations duly organized and existing under the laws of the State of Minnesota; that the plaintiff Northern Development Company is and for more than twenty-five (25) years last past has been a corporation duly organized and existing under the laws of the State of West Virginia and qualified to do business in the State of Minnesota; that the plaintiff Luzerne Iron Mining Company is and for more than thirteen (13) years last past has been a corporation duly organized and existing under the laws of the State of Minnesota; that all of said corporations were organized for the purpose of engaging in the business of mining and of conducting mining operations.

3. That at the 1923 session thereof, the Legislature of the State of Minnesota passed Chapter 226 of the Session Laws of that year, which was approved by the Governor, and a copy of which is hereto attached, marked "Exhibit A."

4. That pursuant to said statute the defendants Samuel Lord, J. G. Armson and Odin Halden, constituting said Minnesota Tax Commission, have threatened to enforce the same and are taking measures to require reports thereunder and demanding that the plaintiffs herein pay taxes upon the royalties which have been received or may [fol. 4] be received by plaintiffs during the year 1923, in accordance with the provisions of said statute; that said defendants Lord, Armson and Halden, constituting said Minnesota Tax Commission, are demanding of plaintiffs that they file the report specified in Section 3 of said statute, and are threatening to assess the tax hereinafter mentioned against plaintiffs and their respective property interests and to certify such taxes and penalties in accordance with the provisions of said statute, so as to cause the same to become a lien upon the respective property interests of plaintiffs as hereinafter set forth, and so cast a cloud upon the respective titles of plaintiffs; that the taxes which plaintiffs would be thus required to pay would be a lien upon their respective real estate property interests in Minnesota and a cloud upon the same if the said statute is valid and constitutional; that plaintiffs allege upon information and belief, that said defendants propose to cause suits to be brought against the respective property interest of plaintiffs and possibly separate suits against each of these plaintiffs as to each one of their mining properties on account of the interest of each of plaintiffs therein so as to obtain a separate lien as against the interest of each plaintiff, in each such mine for the amount of royalties received therefrom, causing a multiplicity of vexatious suits, and so interfere with the property rights and privileges of plaintiffs, unless restrained by the Court.

5. That this is a suit in equity arising under the Constitution of [fol. 5] the United States in that the plaintiffs seek to enjoin the defendants from acting under or in pursuance of or in any way carrying out or enforcing the provisions of said Chapter 226 of the Laws of Minnesota for 1923, upon the ground that said statute and any and all acts done or attempted to be done thereunder by said defendants are and would be in violation of the Constitution of the United States, as well as of the Constitution of the State of Minnesota, in the particulars hereinafter set forth. That the amount of taxes which said defendants threaten to levy and collect for the year 1923 against the plaintiffs would be upwards of Fifty Thousand Dollars ($50,000.00), exclusive of interest, costs and penalties, and the amount of the tax under said statute which said defendants would attempt to levy against said plaintiffs for each successive year during the whole life of the leases which are on the plaintiffs' properties, the unexpired terms of which are of varying lengths, that is, from five (5) to forty-five (45) years, will be upwards of Three Thousand Dollars ($3,000.00), and will amount to many thousands of dollars.

6. That said plaintiff Lake Superior Consolidated Iron Mines is the owner of a certain mineral leasehold interest in and to certain real estate situate in St. Louis County, Minnesota, known as the Biwabik mine; that Biwabik Mining Company is the owner by assignment of a mineral sub-lease covering said Biwabik mine from and by virtue of which sublease said plaintiff Lake Superior Consolidated Iron Mines during the year 1923 received certain royalties; that said plaintiff Lake Superior Consolidated Iron Mines is also the [fol. 6] owner of a State Mineral Contract in and to certain real property in St. Louis County, Minnesota, known as the Misabe Mountain mine; that the Neville Iron Mining Company, a Minnesota corporation, is the owner by assignment of a mineral sublease upon said Misabe Mountain mine from and by virtue of which sublease said plaintiff Lake Superior Consolidated Iron Mines during the year 1923 also received certain royalties;

That said plaintiff Oliver Iron Mining Company is the owner of an undivided 1/10 interest in the fee of certain real property situate in said St. Louis County, known as the Zenith mine, which mine is under mineral lease by assignment to Vermillion Mining Company, a Minnesota corporation, from and by virtue of which lease said plaintiff Oliver Iron Mining Company during the year 1923 received certain royalties;

That said plaintiff Northern Development Company is the owner of the fee of certain real property situate in said St. Louis County, known as the Victoria mine, which is under mineral lease to Auburn Iron Company, a Minnesota corporation, from and by virtue of which lease said plaintiff Northern Development Company during the year 1923 received certain royalties;

That said plaintiff Bishop Iron Company is the owner of an undivided 87/100 interest in the fee of certain real property situate in Lake County, Minnesota, known as part of the Section 30 mine, which is under mineral lease to Section 30 Mine, Inc., a Minnesota [fol. 7] corporation, from and by virtue of which lease said plaintiff Bishop Iron Company during the year 1923 received certain royalties;

That said plaintiff Elba Iron Company is the owner of the fee of certain real property situate in St. Louis County, Minnesota, known as the Elba mine, which is under mineral lease to Hobart Iron Company, a Minnesota corporation, from and by virtue of which lease said plaintiff Elba Iron Company during the year 1923 received certain royalties;

That said plaintiff Luzerne Iron Mining Company is the owner of the fee of certain undeveloped real property situate in St. Louis County, Minnesota, known as a part of the Donora mine; that said Donora mine is under mineral lease to Donora Mining Company, a Minnesota corporation, from and by virtue of which lease said plaintiff Luzerne Iron Mining Company during the year 1923 received certain royalties; that said plaintiff Luzerne Iron Mining Company is also the owner of an undivided 59/60 interest in the fee of certain other real property in St. Louis County, Minnesota, known as the Tener mine, which is under lease to said plaintiff Oliver Iron Mining

Company, from and by virtue of which lease said plaintiff Luzerne Iron Mining Company during the year 1923 received certain royalties;

That for said interests in fee the plaintiffs above named paid substantial considerations in money;

That the tax which defendants threaten and propose to levy against the royalties above referred to under and pursuant to said statute would be in excess of the sum of Fifty Thousand Dollars ($50,000.00).

[fol. 8] 7. That under the statutes of the State of Minnesota all real property is valued for ad valorem taxation purposes and the taxes are assessed as of such value on the first of May of any given year, and likewise all personal property and money and credits are valued and assessed for ad valorem taxes as of the first of May of any given year. That under said statutes the respective fee interests of plaintiffs in the iron ore in said real estate is valued for taxation purposes at fifty per cent (50%) of its true and full value, which is higher than the valuation for taxation purposes of any other class of property whatsoever in the State of Minnesota; that the surface of said fee interests is valued for taxation puposes under said statutes at forty per cent (40%) of its true and full value where it is urban property and thirty-three and one-third per cent (33⅓%) where it is not urban property; that under said statutes moneys and credits of plaintiffs are taxed, as are moneys and credits of all residents and corporations throughout the State, at three mills on the dollar of the actual value thereof, and that other personal property throughout the State is assessed and taxed at forty per cent (40%) of its true and full value, except as to household goods, agricultural products and stocks of merchandise, which are valued at a somewhat lower rate, all as provided in Chapter 140 of the Session Laws of 1923, being an amendment of Section 1988 of the General Statutes of 1913; that at least a portion of the royalties received by these plaintiffs during the year 1923 are taxed for said year under said General Statutes.

[fol. 9] 8. That the said statute, in case the tax leviable thereunder is not paid as therein specified, requires an action to be brought by the State District Court of Ramsey County, Minnesota, for the amount thereof and interest and costs. It provides for a penalty of ten per cent (10%) as against this plaintiff for failure to make a report as required by Section 3 of the Act, and an additional penalty of ten per cent (10%) in case such tax is not paid by the first of June following the year for which it was levied, and for interest at the rate of one per cent (1%) per month commencing thirty (30) days after the same falls due and interest at a like rate in case judgment therefor shall be obtained. It provides that the tax shall be due as of the first of June and shall from thenceforth be a specific lien upon plaintiffs' interests in and to the land from which the ore may be mined. But said statute gives no right of contest to test the validity of said tax prior to the imposition of the two ten per cent (10%) penalties and one per cent (1%) per month interest in

addition, up to the time the Attorney General, in behalf of the State, may choose to commence a suit and until the determination of such suit.

9. That if the plaintiffs should pay such tax they could not maintain a suit in the Federal or State Courts to recover it, without the consent of the State of Minnesota, as the State cannot be sued without its consent, and no such consent has been or will be given. That there is, therefore, no adequate remedy at law in the Federal Court, and plaintiffs having none such are entitled to equitable relief in the Federal Court.

[fol. 10] 10. That this suit and the restraining order and injunction applied for herein are in good faith and upon proper and reasonable grounds of contest as to the constitutionality and validity of said State statute, and plaintiffs are entitled to the protection of this Court as against the imposition of such penalties and interest, as the imposition of the same would be inequitable and unjust even though the statute should be held valid.

11. That the leases and subleases above referred to under and by which the royalties above mentioned become payable to plaintiffs were made at various times prior hereto, some of them being made many years ago, and all of said leases and subleases still have several years to run. That under the said statute the State is not required to bring an action within any certain time and might not bring such action for years, and yet the tax provided for in said statute would become a lien upon the right, title, interest and estate in said lands owned by these plaintiffs according to said statute as early as the first of June, 1924, and constitute a cloud thereon from said date and in fact does now constitute a cloud upon the said titles of these plaintiffs, in that it is provided that said tax shall be a specific lien upon the interests of those plaintiffs in the lands on account of which the royalty is paid and the tax levied.

12. That the royalties received by said plaintiffs Lake Superior Consolidated Iron Mines and Northern Development Company, which are foreign corporations, are, and during the year 1923 were, [fol. 11] received by them in the State of New York at their respective offices or the office of their fiscal agent, and have no situs within the State of Minnesota for the purpose of taxation and are not subject to the tax imposed by said Act.

13. That said Act is in violation of the Constitution of the United States and of the Constitution of the State of Minnesota and is, therefore, void in that it violates the provisions of the Fourteenth Amendment to the Constitution of the United States providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and, further, in that it violates Sec-

tion 1 of Article 9 of the Constitution of Minnesota, providing that taxes shall be uniform upon the same class of subjects.

14. That if said tax is held to be a tax upon the sale price or proceeds of said mineral lands or of the iron ore therein by reason of said royalties being the equivalent thereof, said statute operates unequally against these plaintiffs in that no corresponding tax under said statute or under any other Act is imposed upon the proceeds of the sale of mineral lands or of ore therein or of other lands or property, that there have been many instances and in 1923 were instances in which fee owners operated their own property and sold the ore produced and in which lessees operated properties leased by [fol. 12] them and sold the ore produced, and in which lessors of mineral lands and also lessees sold and conveyed their interest in the premises and in the ore therein; that by reason of said fact said statute violates the Fourteenth Amendment of the Constitution of the United States in that it denies to the plaintiffs the equal protection of the laws, and Section 1 of Article 9 of the Constitution of the State of Minnesota requiring that all taxes shall be uniform upon the same class of subjects.

15. That if said tax is held to be a tax upon the rents and profits derived from said lands, then said statute operates unequally against the plaintiffs in that no corresponding tax is imposed by said Act or any other act upon the rents and profits from lands other than mineral lands nor upon the rents and profits of mineral lands, except when the same accrue to the owner thereof in the form of royalties, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article 9 of the Constitution of the State of Minnesota.

16. That if said tax is held to be in effect a tax upon land by reason of being a tax upon the rents and profits derived therefrom, then said statute operates unequally against the plaintiffs in that it selects only the rents and profits derived from mineral land in the form of royalties and in that no corresponding tax is imposed by said Act or any other act upon lands other than mineral lands or upon the rents and profits therefrom; or upon mineral lands or the [fol. 13] income therefrom except when the income from said mineral lands accrues to the owner thereof in the form of royalties; all in violation of the Fourteenth Amendment of the Constitution of the United States and of Section 1 of Article 9 of the Constitution of the State of Minnesota.

17. That if said tax is held to be an income tax by reason of said royalties being income received from said lands, then the said statute operates unequally against the plaintiffs herein in that no corresponding tax is imposed by said Act or any other act upon income from any other property or source whatsoever, including income derived from mineral lands other than in the form of said royalties, all in violation of the Fourteenth Amendment of the Constitution

of the United States and Section 1 of Article 9 of the Constitution of the State of Minnesota.

18. That if said tax is held to be a tax upon moneys received by said plaintiffs as royalties, then said statute operates unequally against the plaintiffs in that no corresponding tax is imposed by said Act or any other act upon moneys which have been derived from other sources, whether by way of income or conversion of other property or in any manner whatsoever; that all of the royalties received by the plaintiffs herein are received by them in the form of moneys or credits; that such attempted classification of moneys or credits according to the source from which it is derived is unreasonable and invalid, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article 9 of the Constitution of the State of Minnesota.

[fol. 14] Wherefore, plaintiffs pray this Honorable Court for judgment and decree against the defendants, and each of them, as follows:

1. That the said Chapter 226 of the Laws of 1923, being entitled "An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same", be adjudged unconstitutional, invalid and void.

2. That this Court grant to the plaintiffs against the defendants, and each of them, individually and in their representative capacities as officers of the State of Minnesota, a temporary restraining order, to be replaced by an interlocutory injunction to be granted by an enlarged court of three Judges pursuant to Section 266 of the Judicial Code of the United States, and that upon a final hearing to be succeeded in turn by a permanent injunction restraining and enjoining such defendants from acting under and in pursuance of, or from in any way carrying out or enforcing the provisions of said Chapter 226 of the Laws of Minnesota of 1923 against plaintiffs.

3. That the Court grant plaintiffs such other and further relief as to the Court shall seem just and proper.

C. A. Severance, George W. Morgan, Solicitors for Plaintiffs.
Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, of counsel.

[fol. 15] Sworn to by W. W. Watson, Jr. Jurat omitted in printing.

[fols. 16 & 17] EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 226—H. F. No. 29

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Tax on iron ore royalties—Rate.—There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

Sec. 2. Definitions.—For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, copartnerships, associations, companies and corporations.

Sec. 3. Annual Reports to Tax Commission.—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calender year, and such other information as said commission may require.

Sec. 4. Contents of Reports.—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.

2. The amount of royalty paid on each tract of land separately.

3. The name and post office address of each person to whom royalty is paid, and

4. Such other information as said commission may require.

Sec. 5. Tax Commission to Assess Tax.—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if

found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. Penalties for Non-payment.—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. Date of Payment.—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. Tax a Lien on Lands and Ore.—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. Auditor to Make Draft.—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

Sec. 10. Treasurer to Collect Tax.—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11. Penalties for False Returns.—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. Records to be Open to Inspection of Tax Commission—Violations and Penalties.—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. Taxes to be Paid into General Revenue Fund.—All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE BILL OF COMPLAINT—Filed March 31, 1924

It is stipulated and agreed by and between the parties hereto and their respective solicitors that the attached amended bill of complaint may be filed as and for the amended bill of complaint of the plaintiffs herein, and that an order of the court to that effect may be made.

Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Solicitors for Defendants. C. A. Severance, George W. Morgan, Solicitors for Plaintiffs.

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER TO FILE AMENDED COMPLAINT—Filed April 2, 1924

Upon stipulation of the parties, it is hereby ordered that the foregoing amended bill of complaint may be filed as the amended bill of complaint of the plaintiffs herein.

Wm. A. Cant, Judge of United States District Court.

Dated April 1, 1924.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED BILL OF COMPLAINT—Filed April 5, 1924

The above named defendants for their joint and several answers to the amended bill of complaint of the plaintiffs in the above entitled cause respectfully represent and state to the court as follows:

I

Defendants admit the allegations of paragraph 1 of the amended bill of complaint.

II

Defendants admit the allegations of paragraph 2 of the amended bill of complaint.

III

Defendants admit the allegations of paragraph 3 of the amended bill of complaint.

[fol. 21]

IV

Defendants admit the allegations of paragraph 4 of the amended bill of complaint, except in so far as in said paragraph it is alleged that the defendants are about to institute vexatious suits and thereby interfere illegally with the property rights and privileges of the plaintiffs, which the defendant deny.

V

Defendants admit the allegations of paragraph 5 of the amended bill of complaint.

VI

Defendants admit the allegations of paragraph 6 of the amended bill of complaint, except the allegation that the plaintiffs paid substantial considerations in money for the interests in fee described in said paragraph, and state that they have no knowledge or belief as to that allegation.

VII

Defendants admit the allegations of paragraph 7 of the amended bill of complaint, except in so far as it is alleged that a portion of the royalties received by the plaintiffs during the year 1923 are taxed for said year under the general statutes of Minnesota, and state that they have no knowledge or belief as to said allegation.

VIII

Defendants admit the allegations of paragraph 8 of the amended bill of complaint.

IX

Defendants admit that if the plaintiffs should pay said tax, they could not maintain a suit in either the federal or the state courts to recover it.

[fol. 22]

X

Defendants state that they have no knowledge or belief as to whether this suit and the application for restraining order and injunction herein are in good faith, and deny that the same are based upon proper and reasonable grounds of contest as to the constitutionality and the validity of the statute, and deny that the plaintiffs are entitled to the protection of this court as against the imposition of the penalties and interest imposed thereby, and deny that the imposition of such penalties and interest is inequitable and unjust.

XI

Defendants admit the allegations contained in the first sentence of paragraph 11 of the amended bill of complaint, and admit that the

amount of the tax as determined by the Minnesota Tax Commission will on June 1, 1924, become a lien upon the right, title, interest and estate in said lands owned by the plaintiffs on which the royalty was paid, and will thereafter remain a lien thereon until the tax is paid.

Defendants deny that under the statute the state is not required to bring an action to collect said tax within any certain time, but allege that it is the duty of the attorney general of the state to bring such action forthwith upon the nonpayment of the tax when due.

XII

Defendants deny the allegations of paragraph 12 of the amended bill of complaint.

XIII

Defendants deny the allegations of paragraph 13 of the amended bill of complaint.

XIV

Defendants deny the allegations of paragraph 14 of the amended [fol. 23] bill of complaint.

XV

Defendants deny the allegations of paragraph 15 of the amended bill of complaint.

XVI

Defendants deny the allegations of paragraph 16 of the amended bill of complaint.

XVII

Defendants deny the allegations of paragraph 17 of the amended bill of complaint.

XVIII

Defendants deny the allegations of paragraph 18 of the amended bill of complaint.

Having thus made a full answer to all the matters and things contained in the amended bill, the defendants pray that said bill be dismissed and for judgment for their costs in this behalf incurred.

Dated April 4, 1924.

Clifford L. Hilton, Attorney General; G. A. Youngquist, Assistant Attorney General, Solicitors for Defendants, 102 State Capitol, St. Paul, Minnesota. Patrick J. Ryan, of Counsel, Guardian Life Building, St. Paul, Minnesota.

[fol. 24] Sworn to by Clifford L. Hilton. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed Feb. 2, 1924

This matter having come on before the undersigned, Judge of said Court, on the 2nd day of February, 1924, at the Court Rooms in the City of Duluth, Minnesota, pursuant to motion of the plaintiffs for a temporary restraining order and upon an order to show cause, of which due notice was given to each of the defendants, Mr. Elmer F. Blu appearing for the plaintiffs and Mr. G. A. Youngquist, Assistant Attorney General of Minnesota, appearing for the defendants, and the Court being fully advised in the premises and it being made to appear by the averments of the bill of complaint herein that irreparable loss or damage will result to the plaintiffs before the hearing of the plaintiffs' application for an interlocutory injunction can be had, unless the defendants herein are, pending the said hearing, enjoined and restrained as prayed for in said bill of complaint,

It is ordered that the defendants and each of them be and they hereby are enjoined, restrained and prohibited, either as individuals or as representatives of the State of Minnesota, until the hearing [fol. 26] and determination of the plaintiffs' motion for an interlocutory injunction and until the further order of the court herein, from acting under or in pursuance of, or from in any way carrying out or enforcing the provisions of, the act of the Legislature of the State of Minnesota, being Chapter 226 of the Laws of 1923, entitled "An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explor-, mine, take out and remove ore from the same," so far as the plaintiffs herein are concerned, except that the defendants shall not be enjoined or prohibited from receiving and filing any reports which the plaintiffs may make pursuant to said statute.

Dated at Duluth, Minnesota, this 2nd day of February, 1924.

Wm. A. Cant, Judge.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE RESTRAINING ORDER—April 7, 1924, as of Jan. 12, 1924

[fol. 28] It is hereby stipulated by the parties hereto that the issues in the above entitled proceedings shall be heard and determined

on the merits by Honorable William A. Cant, at St. Paul, Minnesota, on April 7, 1924, at 10 o'clock A. M. or as soon thereafter as counsel can be heard, and that the restraining orders heretofore issued herein shall remain in full force and effect pending said determination of the issues on the merits in lieu of an interlocutory injunction pursuant to the requirements of the act of Congress relating thereto, the application therefor, hearing thereon and determination thereof by three judges being hereby expressly waived.

Washburn, Bailey & Mitchell, Solicitors for Plaintiffs in Royal Mineral Association et al. v. Lord et al. and William E. Boeing et al. v. Lord et al. J. W. Hunt, W. D. Bailey, Solicitors for Plaintiffs in Robert B. Whiteside et al. v. Lord et al. C. A. Severance, George W. Morgan, Solicitors for Plaintiffs in Lake Superior Consolidated Iron Mines et al. v. Lord et al. Fred B. Snyder, Edward C. Gale, John R. Vanderlip, Solicitors for Plaintiffs in Bardwell et al. v. Sargent Land Company et al. —— ——, Solicitors for Plaintiffs in Burrows et al. v. Lord et al. Clifford L. Hilton, Attorney General; G. A. Youngquist, Assistant Attorney General, Patrick J. Ryan, Solicitors for Defendants.

[fol. 29] Let this stipulation be filed as of January 12, 1924. Dated April 7, 1924.

Wm. A. Cant, Judge.

[File endorsement omitted.]

[fol. 30] In United States District Court

[Title omitted]

Agreed Statement of Facts—Filed April 8, 1924

For the purpose of trial of the above entitled suit, it is hereby stipulated and agreed by and between the respective parties hereto that, subject to objections as to relevancy and materiality, the following facts may stand as admitted; that any party may introduce evidence in the regular manner upon the trial of this cause relative to any matters properly within the issues covered by the pleadings and not controverting the facts herein stipulated. Subject to such understanding, it is agreed as follows:

1. Wherever matters are alleged in the amended bill of complaint and admitted in the answer thereto, the matters so alleged and admitted shall be deemed proven.

2. The taxes which the Minnesota Tax Commission threatens to levy against the Lake Superior Consolidated Iron Mines, plaintiff herein, for the year 1923, are upwards of $50,000.00 and, against the other plaintiffs, are very substantial sums.

3. The facts set forth in the paragraphs numbered 14 to 22 inclusive of the agreed statement of facts in the case of Royal Mineral [fol. 31] Association, et al., against Samuel Lord, et al., and two other cases tried with said case, shall be deemed to have been proven as part of the record in this case.

The four properties referred to in paragraph 14 of said agreed statement of facts, operated by the owners thereof, were owned and operated by persons other than the plaintiffs herein.

Of the properties referred to in paragraph 21 of said agreed statement of facts, only ten are owned by any of the plaintiffs herein.

4. The evidence, including the oral stipulations, in said case of Royal Mineral Association et al., against Samuel Lord, et al., outside of said agreed statement of facts, shall be available to any party hereto as fully as if the same had been received as part of the record in this case.

C. A. Severance, George W. Morgan, Solicitors for Plaintiffs. Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, of Counsel for Plaintiffs. Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 32] Paragraphs numbered 14 to 22, inclusive, of the agreed statement of facts in the case of Royal Mineral Association, et al., vs. Samuel Lord et al., and two other cases tried with said case and referred to in the foregoing agreed statement of facts in the case of Lake Superior Iron Mines, et al., vs. Samuel Lord, et al., are in the following language, namely:

"14. That in 1923 there were in Minnesota one Hundred twenty-four (124) mines in operation (including State owned mines), producing 45,300,000 tons of ore. There were, during the year 1923 in Minnesota four instances in which fee owners, other than these plaintiffs, operated their own properties and sold the ore produced, without receiving or paying royalties thereon; that in two of those instances the operation was largely a cleaning-up process, the mines being near exhaustion, the ore produced from these two properties amounting to approximately 92,000 tons; and in the third instance the operator mined his fee-owned property in connection with adjoining leased property, producing from the former 91,000 tons of ore and from the latter 111,000 tons of ore; and in the fourth instance there remained about 250,000 tons of open pit ore, of which 128,000 tons were removed in 1923 and the remainder of which the owner intends to remove forthwith, and that there remains 3,200,000 tons of underground ore which the owner does not intend to mine for several years to come but does intend to mine later.

"15. In very many instances, in fact in the majority of cases where mines are operated, they are operated by lessees who derive the

consideration or returns for the ore produced through mining and selling it, and do not receive any returns through royalties paid to them, and this was true in 1923.

[fol. 33] "16. That the iron ore in the lands of the plaintiffs constitutes the chief value thereof, and that in the case of iron ore deposits as a general rule the entire substantial value thereof consists in such iron ore.

"17. That for the year 1923 the total amount of royalties on iron ore reported to the Minnesota Tax Commission was $16,347,004.22 of which amount approximately $9,538,151.87 was reported as being received by resident owners, excluding from such resident owners foreign corporations, and approximately $1,474,150.58 was reported as being received by corporations foreign to the State of Minnesota, the remaining approximately $5,334,701.77 being reported as received by non-residents of the State.

"18. All the known iron mines in the State of Minnesota lie in the northern or northeastern part of the State.

"19. That approximately one-half of the mines operated in Minnesota in 1923 were open pit mines and approximately three-fourths of the ore mined in 1923 was taken from open pit mines. In the usual course of mining from open pit mines, the surface is removed and the iron ore mined by the use of steam shovels.

"20. At various times two hundred forty-three (243) iron mines, underground and open pit, have been in operation, of which forty-five (45) have been exhausted.

"21. That the total tonnage of merchantable ore in Minnesota, according to the figures of the Minnesota Tax Commission in 1923, was approximately 1,300,000,000 tons. That during the year 1923 approximately forty (40) mines owned by subsidiary corporations of a certain corporation in fee were held by those corporations free from lease and were not operated, which mines, according to said figures, contained 344,000,000 tons of such ore. Seven (7) such mines were so held by one of such subsidiaries, which is an operating company, which was during said year engaged in mining, but not on any of said forty properties and that the present intention of said operating company is to mine said properties and not to lease them. [fol. 34] The remaining mines above referred to were in 1923, and previously, owned in fee by said subsidiary corporations of the parent corporation, and prior to 1923 several of the mines were operated by said operating company under arrangements between said operating company and said other subsidiary corporations, which arrangements did not in any instance involve the payment of any royalty by said operating company to any such owning subsidiary corporation. During 1923 one mine was operated under such arrangement, and it is the present intention of said corporations to continue the said prac-

tice of operating their said mines under the aforesaid arrangements, not involving the payment of royalties.

"22. During the last few years preceding 1923 there have been a number of instances in which iron ore properties not subject to lease have been sold outright and the fee transferred for a cash consideration, and a number of instances in which the fee of iron ore properties has been purchased by the lessee and the lease thereon cancelled. In 1923 there were at least two, and possibly more, instances in which fee owners of iron ore land which was not subject to lease sold the same for a cash consideration, or its equivalent, one of which consisted in the purchase of an undivided one-sixteenth interest in fee by a company which already held a lease on the remaining fifteen-sixteenths interest. There was one instance in 1923 where an undivided eleven-thirty-seconds of the interest in fee was sold subject to an existing lease, the purchaser of said undivided fee interest and the lessee under said subsisting lease being companies having the same stockholders. There was another instance in 1923 of the sale of the fee interest, which is described in the agreed statement of facts in Bardwell, et al. v. Sargent Land Company, et al. tried herewith."

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Evidence—Filed March 13, 1924

CAPTION

The above entitled cause came regularly on for hearing in the Federal Building, City of St. Paul, State and District of Minnesota, on the 7th day of April, 1924, before the Honorable William A. Cant, Judge; Messrs. C. A. Severance, George W. Morgan, Frank D. Adams and Elmer F. Blu, appearing on behalf of the plaintiffs, and Honorable Clifford L. Hilton, Attorney General, G. A. Youngquist, Assistant Attorney General, and Patrick J. Ryan appearing on behalf of the defendants;

Whereupon the following proceedings were had, to-wit:

It was stipulated that said cause for convenience should be heard with the case of Royal Mineral Association, a corporation, plaintiff, vs. Samuel Lord et al., defendants, Equity Case No. 99, and other similar cases, all of which are now on appeal to the Supreme Court of the United States.

[fol. 36] ERNEST S. MCGOWAN, of the Sales Department of The Universal Portland Cement Company, residing in Minneapolis, Minnesota, testified he has been engaged in that business for eighteen years and it is part of his work to keep track of the location of good

sand and gravel in connection with the sale of cement. From 750,000 to 1,000,000 yards or tons of gravel are used in the State of Minnesota per year in connection with the making of concrete and the use of cement, and upwards of 4,000,000 yards or tons for all purposes, including road work. Deposits of gravel are found in about one-half of the various localities in the state. A greater part of them are leased on a royalty basis. It is the exception rather than the rule that any other method is used. The royalty rate is usually about ten cents per yard, but in some cases it is fifteen cents and occasionally as high as twenty-five cents. It is common, as to comparatively large gravel pits, that a minimum payment per year, whether gravel is taken or not, is provided in the lease. The method of mining gravel is similar to the method of mining iron ore by open pit operations. The gravel requires a washing operation to remove soil, clay, etc., and hence is very similar to the open pit iron ore operation where the ore requires beneficiation. Gravel pits vary in depth from a few feet to sixty or seventy feet.

On cross examination witness testified that there are about forty large commercial pits in the state. It was his impression that nearly all of them are operated under lease. He had not ever personally examined any of those leases.

CHARLES H. YOUNG, Secretary of District #19, National Sand & Gravel Association, testified that he is a resident of St. Paul with an office in Minneapolis, and is president of Robbins, Young & Co., and operator of Landers, Morrison & Christenson Co., both companies being sand and gravel operators, and witness has been in [fol. 37] that business for ten years. There are more than forty commercial gravel pits of considerable size in the state. A number of them, three of the largest, are operated on a royalty basis and with the others it is quite general. The royalty usually runs from five cents up. His own companies own their properties. Gravel is found in commercial quantities in about one-half of the various localities in the state. Merchantable gravel should have a depth of from 20 feet up to about 70 feet. The annual production of gravel in the state of Minnesota for all purposes is in excess of 5,000,000 yards per year, of which over one-half is handled on a royalty basis, although he does not think he has personally inspected any of the leases; he is not sure. Where gravel is to be used for ordinary gravel roads it is not washed. When it is to be used for concrete it is washed.

PHIL MCCAULEY, a civil engineer, testified that he has been practicing his profession for fifteen years and has been in the Minnesota Highway Department for three years with the title of right of way engineer. A part of witness's duties is the leasing of gravel pits in

connection with the construction of trunk highways. The state in the last few years, in connection with the highway department, has been using from 500,000 to 1,000,000 tons or yards of gravel per year. The gravel is obtained in four methods: (1) The principal method is by what is called a patrolman's permit for a small amount of gravel on a royalty basis; (2) where a large quantity is wanted and the state has an exclusive right to it at so much per yard; (3) where a pit is leased for a period of years on a royalty basis; (4) where the pit is bought outright. About seventy-five per cent of the gravel is obtained on a royalty basis under the three methods first mentioned. The state now has about 1,500 to 1,800 gravel leases, including patrolman's permits, on a royalty basis. The royalty runs from three cents up to thirty-five cents. In extreme cases [fol. 38] it has been fifty cents, but that lease has been discontinued. It is generally from five to seven cents a cubic yard. Some of the leases provide for a minimum payment whether gravel is taken in a given time or not.

On cross-examination the witness testified that all of the gravel beds leased by the state were used for the purpose of furnishing gravel for state highways. Of the gravel pits that he has knowledge of in the state, particularly the larger pits, many are held and owned by railroad companies in connection with their work in keeping up their railroad business. Pits which are operated for the furnishing of gravel for purposes other than state, county or city road work or for railway purposes are comparatively few. At the height of the season there are about 1,000 patrolmen employed on the state highways.

Joseph Shiely, of St. Paul, Minnesota, testified that he is producer of mineral aggregates, sand, gravel and crushed rock, that he is president of J. L. Shiely Company, and is Secretary and Treasurer of National Sand & Gravel Association. The bulk of gravel in the state is handled on a royalty basis. His company last year produced 225,000 yards or nearly 300,000 tons, all from pits located within the city limits of St. Paul. They operate on a royalty basis, paying fifteen cents per cubic yard. There are several rock quarries in the state operating on a royalty basis. Witness has had some experience with the method of mining iron ore by the open pit method, having been employed at one time by Butler Brothers when the Cyprus Mines were open at Carson Lake, Minnesota. When iron ore is mined by the open pit method and ore is washed to make it marketable, the process as to machinery and plant equipment is very similar to that used in operating a gravel bed. Gravel bed leases generally provide a minimum royalty payment whether gravel is actually mined or not. There are instances [fol. 39] where there are subleases of gravel beds, the sub-lease providing for a higher royalty than the underlying lease. The annual production of gravel in Minnesota for commercial purposes, not including gravel used for highway purposes taken from pits used

or purchased for that purpose, runs about between 2,000,000 and 3,000,000 tons. Commercial gravel, washed, screened and crushed, is worth $1.25 per ton, f. o. b. St. Paul or Minneapolis.

CHARLES HAYDEN, Assistant Right of Way Land and Tax Commissioner of the Great Northern Railway Company, testified that he has held that position with the railway company for more than 20 years and in that connection has had to do with the leasing of gravel pits for the railway company. The railway company has leases of gravel pits made to others on a royalty basis.

D. E. WOODBRIDGE, mining engineer at Duluth, Minnesota, testified that he has recently made an investigation in the state offices and that the state of Minnesota, as lessor, has outstanding at the present time eleven leases on gravel beds and has had a total of thirty since 1921. All of the present eleven are on the basis of a royalty of five cents a yard. On those which have terminated the royalty has run from five cents to twenty-three and a half cents. Five of the eleven leases are to the county commissioners of St. Louis county, two to people in Hibbing, two to people in Chisholm, and two to people in Kinney.

In comparing the operation of iron mines and gravel pits, the first thing in both is exploration for quantity and quality. This is done in both cases either by drilling or test pitting, the properties are then stripped and the ore or the gravel is mined by mechanical process such as steam shovels, drag lines or the like. The general process of washing iron ore is to pass it through screens. The gen- [fol. 40] eral process of washing gravel is also to pass it through screens. The coarse ore is crushed and the coarse gravel is crushed. is crushed.

JOHN L. WATSON, Right of Way Commissioner of the Northern Pacific Railway Company, St. Paul, Minnesota, testified that it has been customary for his railroad to make leases on gravel pits on a royalty basis, of which they have three outstanding at the present time. These leases provide for an annual minimum payment whether any gravel is taken or not. The rate varies from five cents to ten cents per yard.

HECTOR MACCRAW, Mineral Clerk of the Minnesota Tax Commission, testified that according to the report of his department the total tonnage of the known merchantable iron ore on state owned land in December, 1922, was approximately 150,000,000 tons, with a total of 84 mining leases outstanding. For ore mined during the year 1923 the state was paid in royalties approximately $1,955,-

805.40. Most of the state leases are on a twenty-five cent royalty basis. The royalty paid in 1923 represents a tonnage mined of about 5,000,000 tons during that year. About one-tenth of the known merchantable iron ore in the state belongs to the state of Minnesota.

Stipulation re Facts

It was stipulated in the evidence that royalty rates in iron mining leases in the state of Minnesota vary from 12½ cents to $1.25.

It was further stipulated that it was understood that the sand and gravel witnesses testified that royalties on sand and gravel leases were actually paid during the year 1923.

It was further stipulated that it has been the practice in Minnesota for many years to lease real estate such as business lots in cities on long time leases for rentals payable from time to time in cash and that this was true during 1923.

[fols. 41 & 42] It was further stipulated that agricultural lands were, during 1923, and for many years last past had been, often and customarily leased for rentals, cash or otherwise in the state of Minnesota.

It was conceded that Chapter 226, General Laws of Minnesota for the year 1923 was the only statute providing a tax on rentals in the state of Minnesota.

It was also conceded by counsel for the defendants that the court had equity jurisdiction.

It is further stipulated and agreed that the foregoing transcript of evidence and proceedings had in the above entitled cause is a full, complete and correct statement thereof.

Dated this twelfth day of March, 1925.

C. A. Severance, George W. Morgan, Solicitors for Plaintiffs. Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, of Counsel for Plaintiffs. Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Solicitors for Defendants.

Judge's Certificate to Transcript of Evidence

The foregoing transcript of evidence is found to be true, complete and properly prepared, and is hereby approved.

Dated this 13th day of March, 1925.

Wm. A. Cant, Judge United States District Court.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION—Filed Jan. 16, 1925

The memorandum filed herewith in the case of Royal Mineral Association, et al., vs. Samuel Lord, et al., is attached and made a part of this case.

Let decree in the above entitled suit be prepared in accordance herewith and let such decree provide that the temporary restraining order in said suit heretofore issued be and remain in full force and effect for the period of sixty (60) days after the entry of such decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

William A. Cant, Judge U. S. District Court.

[fol. 44] The memorandum filed in the case of Royal Mineral Association, et al. v. Samuel Lord, et al. and referred to in the foregoing order is in the following language, namely:

Memorandum

During the year 1921, the Legislature of the State of Minesota, enacted Chapter 223 of the laws of that year. This Act provided for the levy of a tax payable annually and amounting to six per cent of the valuation of all ore mined or produced within the State during the calendar year. Under the Act, such valuation is ascertained by making certain deductions from the value of such ore at the place where the same is brought to the surface of the earth. Among such deductions is: "4. The amount of royalties paid on the ore mined or produced during the year." This is an occupation tax. Oliver Iron Mining Co. vs. Lord et al., 262 U. S. 172. It is collectible by suit against the person from whom the same is due the same as other demands are enforceable

During the year 1923, the legislature of that State enacted Chapter 226 of the laws of that year. This Act provides that "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine and take out and remove ore from land in this State, a tax of six (6) per cent." By Section 8 of the Act, this tax is made a specific lien on the interest of the person from whom the tax shall be due, in and to the land on account of which the royalties are paid. Provision is also made for collection of the amount due by suit and by a sale thereunder of the interest in such land held by the person from whom the tax shall be due.

Various persons and corporations who are in receipt of royalty from ore lands in said State urge that the tax imposed under Chapter 226, supra, is in violation of certain provisions of the Constitution of the State of Minnesota, and of certain other provisions of the Con-

stitution of the United States, and they have brought a number of actions, of which this is one, to enjoin the enforcement of the tax. In a large way, the question is whether the Act runs counter to any of the constitutional provisions which have been invoked.

The important provision of the State constitution which is involved, is that "Taxes shall be uniform upon the same class of subjects." Article 9, Section 1.

The important provisions of the Constitution of the United States which are involved are found in that part of the Fourteenth Amendment, which reads: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Other constitutional provisions have been discussed on the argument and in the briefs. Without overlooking or minimizing the force of any of them, it may be said that they are either involved in a discussion of the specific provisions above set forth, or they yield to the argument which may be made against them. It is urged, for example, that the Act violates that provision of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts." Article 1, Section 10. Giving the argument in that behalf due weight and consideration, it does not appear that the provision referred to is [fol. 45] applicable here. The laws as to taxation and the amount of the levy in any particular year are subject to constant change. All contracts are made subject to the right and the power of the State to make such modification in the laws with respect to future taxation as may seem necessary. Contracting parties may not in effect agree that the State shall not modify its revenue laws, or shall not either increase or diminish the burden of taxation. If the enactment in question is otherwise valid, it will stand as against this objection.

Speaking generally, unless the Act in question is invalid as against the uniformity clause of the State Constitution, with reference to taxation, above quoted, or as against the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, above quoted, it must stand. These provisions and the discussion thereunder are closely related in a case of this kind. The matter may be reduced to still lower terms. The question is whether this court should hold that the classification, royalties, adopted by the legislature of the State of Minnesota, as a basis of taxation, or for the computation of the tax under Chapter 226, Laws of Minnesota, 1923, is invalid, and that the tax levied pursuant thereto is void.

1. The following rules are specially applicable to the uniformity clause of the State Constitution:

(a) Where that clause is invoked in advance of a decision by the Supreme Court of the State, holding a state law to be in violation thereof, Federal Courts will not so declare, unless such holding shall be imperatively necessary. If there has been no decision by the Supreme Court of the State, the Federal Court will seek to anticipate

what the holding of the State Court would be, and will decide accordingly.

Louisville & Nashville R. R. Co. vs. Garrett et al., 231 U. S. 298, 305;
Pelton vs. National Bank, 101, U. S. 143, 144;
Pullman vs. Knott, 235 U. S. 23, 27;
Michigan Central R. R. Co. vs. Powers, 201 U. S. 245, 291;
Coulter vs. Louisville & Nashville R. R. Co. 196 U. S. 599, 609.

(b) The two cases last above referred to clearly indicate that the Federal Courts are especially loth to interfere where the Act in question involves the revenues of the State.

(c) The Supreme Court of the State of Minnesota has not passed upon the validity of the Act in question.

(d) The holdings of the Supreme Court of the State of Minnesota, as respects classification for the purpose of taxation, are that the legislature has a very wide range of discretionary power. Mutual Benefit Insurance Co. vs. County of Martin, 104 Minn. 179, 181. State vs. Royal Mineral Ass'n. 132 Minn. 232, 235. There are well recognized limitations to this power which serve as guides in the exercise thereof. "The classification must be reasonable, and such as is suggested by essential differences of nature, situation, or circumstances, or by characteristics which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, and impracticable to apply thereto the ordinary methods [fol. 46] of taxation."

Mutual Benefit Insurance Co. vs. County of Martin, 104 Minn., 179, 181, 182;
State ex rel. St. Paul City Ry. Co. vs. Minnesota Tax Commission, 128 Minn. 384.

2. The following rules are applicable to cases where the due process clause or the equal protection clause of the Fourteenth Amendment is invoked, or where one or both of those clauses and the uniformity clause of the State Constitution are involved.

(a) Under all the authorities the classification must be a reasonable one and such as essential differences suggest.

State ex rel vs. Minnesota Tax Commission, 128 Minn. 384;
Gulf Colorado & S. F. Ry. Co. vs. Ellis, 165 U. S. 150, 155;
Southern Ry. Co. vs. Greene, 216 U. S. 400, 417.

(b) The decided policy of the Supreme Court of the United States when the foregoing clauses are invoked, is to announce and enforce the rule allowing State legislatures a wide discretionary power with respect to classification for purposes of taxation. Bell's Gap Ry. R. Co. vs. Penn. 134 U. S. 232.

"Granting the power of classification, we must grant government the right to select the differences upon which te classification shall

be based, and they need not be great or conspicuous. Keeney as Admr. vs. Comptroller, etc., 222 U. S. 525, 536. The State is not bound by any rigid equality." Citizens' Tel. Co. vs. Fuller, 229 U. S. 322, 331."

"Any classification is permissible which has a reasonable relation to some permitted end of Governmental action. It is not necessary * * * that the basis of the classification must be deducible from the nature of the things classified. * * * It is enough, for instance, if the classification is reasonably founded in 'the purpose and policy of taxation.'"

Watson vs. State Comptroller, 254 U. S. 122, 124, 125;
Heisler vs. Thomas Colliery Co. 260 U. S. 245, 255.

"Passing on that amendment (the 14th) we have repeatedly decided * * * that it does not take from the States the power of classification, and also that such classification need not be either logically appropriate or scientifically accurate. * * * A wide range of discretion, therefore, is necessary in legislation to make it practical." District of Columbia vs. Brooke, 214 U. S. 138, 150."

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people. That its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment. Middleton vs. Texas Power & Light Co., 249 U. S. 152, 157."

[fol. 47] Without extended discussion, the same view is taken in National Paper & Type Co. vs. Frank K. Bowers, Collector, U. S. Supreme Court, Dec. 15, 1924.

The equal protection clause of the Fourteenth Amendment does not prohibit double taxation by the States,

Shaffer vs. Carter, 252 U. S. 37, 58;
Cream of Wheat Co. vs. Grand Forks, 253 U. S. 325, 330.

(c) The limitation upon this power of classification is that "It must not be exercised in clear and hostile discrimination between particular persons and classes."

Citizens' Tel. Co. vs. Fuller, 229 U. S. 322, 331;
Heisler vs. Thomas Colliery Co. 260 U. S. 245, 255;
Bell's Gap R. R. Co. vs. Penn. 134 U. S. 232, 237."

(d) In Dawson vs. Kentucky Distilleries Co 255 U. S. 288:

(1) The Court was dealing with nondescript imposition from the beginning.

(2) The basis of the alleged classification and tax was elusive, shifty and unsatisfactory. It was not uniform on property of essentially the same class.

(3) The Act "Imposed upon every person engaged in the business of manufacturing whisky, or in the business of owning and storing

the same in bonded warehouses within the State, what was called an 'annual license tax' of fifty cents a gallon upon all whisky either withdrawn from bond or transferred in bond from Kentucky to a point outside the state."

(4) Though called an annual license tax in the Act, the imposition was held to be a tax on the property.

(5) On the argument it was conceded by the authorities seeking to uphold the tax, that if it was a tax on property, the same was void.

(6) In view of the concession so made, the question of classification was not given extended discussion by the Court.

3. Various facts bearing upon the propriety and justice of the classification here involved must be considered.

The iron deposits constitute a very substantial part of the easily available great natural wealth of the State of Minnesota. Development and operation of iron mines, a highly necessary and important industry, means at the same time the exhaustion of that wealth. Such exhaustion attends also the removal of the products of stone quarries and of gravel beds and the cutting and removal of certain kinds of timber. Generally, the development and successful prosecution of any enterprise increases the taxable wealth of the State. In large part, the products of quarries, gravel beds and forests remain within the State and in some form serve as the basis of taxation therein. With respect to iron ore, however, practically all that is mined is being transported beyond the limits of the State. Great [fol. 48] natural wealth which serves as the basis of taxation is annually being withdrawn therefrom. Of necessity the revenues of the State will be substantially affected thereby.

4. Without doubt, when the Legislature of 1923, met and considered problems of taxation, it knew of Chapter 223, Laws of 1921. State vs. Klasen, 123 Minn. 382. That Act was presumably valid. On its face, it pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of six per cent. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The legislature found this latter class adready carved out by the earlier Act. In 1923, the general purpose apparently was to assure the State a return of a full six per cent, less certain minor deductions, on the value of all ore mined and brought to the surface of the earth. And the further general purpose apparently was to adjust this burden equitably as between the two classes of interests concerned in the operation where the mine was being operated by a lessee. One of these classes, represented by the operator, was specified in Chapter 223, supra, and the tax burden by that Act was imposed thereon. The other interest, represented by those receiving royalties was specified in Chapter 226, Laws of 1923, and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter.

In the consideration of this case, it is neither possible, nor proper to divorce entirely the two acts which have been referred to. Either separately, or together, they indicate the policy of the State with reference to the taxation of the interests therein specified.

5. The Federal Constitution does not require that the two classes above referred to should have been covered by the same enactment, or that the two together should have exhausted the subject and covered the entire field. "The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment." Supra.

6. The basis of classification which may be invoked in support of Chapter 226, is the circumstance or condition that of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration. The desire of the legislature was to reach the interests involved in property of that class and apply thereto a special tax. If such lands may properly be placed in a class by themselves, the rest is a matter of identifying the interests therein for the purpose of taxation. This latter may be called classification of such interests, but it is little more than identification thereof—a pointing out and specifying of the particular interests sought to be taxed.

7. We are concerned to learn whether there was reasonable ground for this classification, and whether under the provisions of the Act, all within the class involved in Chapter 226, may be treated alike. [fol. 49] The burden is on the plaintiff to answer one or both of these questions clearly in the negative. If there has been no "clear and hostile discrimination between particular persons and classes," the law should stand.

Having in mind the real basis for the classification adopted, the fact that other mining properties, not in process of being wasted or depleted, are not included under the provisions of the Act, is not important. This is true whether they are being sold and transferred from time to time, like other property, or are not. With the lapse of time, as such properties come within the class contemplated, the Act will apply. In time, presumably, all ore-bearing properties of substantial value in the State will become subject to the provisions of the law in question.

Chapter 226 is not invalid, because it may be subject to technical criticism, or will not work with perfect nicety of detail, or because conditions may be thought of which would seem to involve differences and inequalities.

"The difference, however, is one such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases and cannot be regarded as unfriendly or unreasonable discrimination."

Shaffer vs. Carter, 252 U. S. 37, 57.

In Oliver Iron Mining Co. vs. Lord, et al., 262 U. S. 172, 181, the Court says: "It is also said that the royalty provision and others respecting taxes will work a discrimination as between lessees in that some will be subjected to a higher tax than others. No doubt, there will be differences in the amount, but they will result from differences in situation and not from differences in treatment. Some lessees pay higher royalties than others and will secure a higher deduction on that score. * * * In short, the tax is to be adjusted to the value of the output, less the major expenses of the business, and this according to uniform rules. We, therefore, cannot say that it is intended to, or will work any arbitrary or unreasonable discrimination as between different lessees."

The circumstance that during the year 1923, plaintiff may have been assessed under the head of "Money and credits," on account of funds then on hand and received as royalties during that year, falls within the foregoing observations and authorities.

The fact that other wasting properties, such as stone quarries, or gravel beds, or certain timber areas are not included in the Act here under consideration, does not invalidate the classification. They might have been included, but the differences and distinctions between them and that which was included, justifies their omission. The differences upon which to base a classification "Need not be great or conspicuous." Supra. Anthracite coal may be classified separately from bituminous coal. Meat packing may be classified separately from the packing of other food products. A special tax may be imposed on dealers in certain specified articles, while dealers in other articles go free.

Heisler vs. Thomas Colliery Co. 260 U. S. 245;
Armour Packing Co. vs. Lacy, 200 U. S. 226;
Southwestern Oil Co. vs. Texas, 217 U. S. 114, 121.

[fol. 50] 8. The legislature has made the classification. First, in a class by themselves, are the ore lands which are in process of being mined, and, therefore, depleted, and which within a comparatively brief time will be lost to the State as a source of revenue. This clearly distinguishes these lands from other lands in general and from other ore lands in particular. The distinction is based on grounds which have a legitimate relation to the question of taxation. Facing the depletion of certain lands and the loss of their value, the State might be justified in imposing a heavier tax thereon during the intervening time, knowing that when that time should elapse there could be no further substantial tax at all. There is no apparent difficulty in making the classification or in according uniformity of treatment in connection therewith.

9. Next is the identification of the separate interests here involved for purposes of taxation, or the classification thereof. As already indicated, as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator who does the mining, and the owner whose ore is being mined, and

the respective interest of each. The interests of an intervening lessee are identified with those of the owner for the purposes here in mind. Although together, the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. So great is that difference that one class, or set of interests may be taxed without the other, as was done by the Act of 1921, and doubtless, different rates of taxation may be imposed, and, as will be seen, different forms of tax may be levied thereon. There is no practical difficulty in recognizing these two classes as separate and distinct for purposes of taxation, and in according uniformity of treatment to all within each class. It is a matter largely of specifying interests, very different in character, which it is sought to reach for purposes of taxation. One is dealt with in the Act of 1921. The right to select that interest as the basis for the imposition of a separate tax is recognized in Oliver Iron Mining Co. vs. Lord et al. supra. Although the tax under the Act of 1921, is an occupation tax, the same is levied because of the operator's relation to the land and in the last analysis, because of his interest therein. By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases where there is but one ownership, the tax is imposed under the Act of 1921.

10. In a case where it is clearly made out that a law is unconstitutional, the Court should not hesitate to so declare. If such proof shall not be made, or if the matter is left in doubt, the law should stand. Invoking now and applying some of the basic rules hereinbefore set forth,—this Court must be slow to hold a State law invalid; under the evidence here, such a holding is not "imperatively necessary;" in enacting the particular law here involved, the State legislature had "a very wide range of discretionary power;" the classification adopted by the legislature "is a reasonable one and such as essential differences suggest;" such classification does not indicate any "clear and hostile discrimination between particular persons and [fol. 51] classes" cannot be said that the classification adopted was not "suggested by * * * characteristics which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, and impracticable to apply thereto the ordinary methods of taxation." It is not clearly shown that Chapter 226, supra, is in violation of either the State or the Federal constitution. The Act, therefore, should be held valid. The justice or injustice of the tax, and the question of where it should ultimately fall, and by whom ultimately it should be paid, are not for determination here and no coment is made thereon.

11. In a sense it may be said that the two taxes herein referred to are together imposed upon the mining operation as a whole, as the same affects any particular description of land. Undoubtedly, the Legislature of 1923, had something like this in mind. This would not require that the two taxes should be of the same kind. The character of the tax depends upon the legislative intent as expressed in the law. Under either Act, the tax might have been laid as an

occupation tax, or as an income tax, or as a tax on the land, as might at the same time be applicable and valid and best give effect to the legislative will. Under the Act of 1921, the convenient and practicable form to employ was that of an occupation tax. Taken literally, the Act of 1923, provides for a tax on royalties. Certain non-residents of the State of Minnesota, urge that as to them, the situs of the royalty is never within the jurisdiction of that State, and, therefore, that the royalty cannot be taxed therein. Shaffer vs. Carter, 252 U. S. 37, 55, is opposed to this view and as against the objection referred to, if the Act were construed as providing for a direct tax on royalties, it would stand. Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax.

Pollock vs. Warmers' Loan & Trust Co., 157 U. S. 429, 581.

12. The question of what royalty receipts shall be included in the computation of the tax for the year 1923, is not decided. It is assumed that in the administration of the law, the Act in question will be so construed as not to offend against any constitutional provision.

From the foregoing, if correct, it follows that the relief prayed for should be denied.

Let decree in the above entitled suit be prepared in accordance herewith, and let such decree provide that the temporary restraining order in said suit heretofore issued be and remain in full force and effect for the period of sixty days after the entry of such decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge United States District Court.

[fols. 52 & 53] In United States District Court

[Title omitted]

Decree—Jan. 15, 1925.

This cause came duly on to be heard and was argued by counsel and upon consideration thereof it is ordered, adjudged and decreed that the bill of complaint herein be, and the same hereby is, dismissed with costs to the defendants to be taxed.

It is further ordered that the temporary restraining order heretofore issued in this suit be and remain in full force and effect for the period of sixty (60) days after the entry of this decree for the purpose of allowing an appeal to be taken therefrom.

William A. Cant, Judge U. S. District Court.

[fol. 54] UNITED STATES DISTRICT COURT

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Feb. 16, 1925

Now come the plaintiffs in the above entitled action, Lake Superior Consolidated Iron Mines, a corporation, et al., feeling themselves aggrieved by the final decree made and entered in the above entitled cause on the sixteenth day of January, 1925, by their counsel, and do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based duly authenticated, be sent to the Supreme Court of the United States. And your petitioners further pray that the court do order that the temporary restraining order heretofore issued in this cause be and remain in full force and effect pending the appeal herein and until the final determination of this cause.

C. A. Severance, George W. Morgan, Solicitors for Plaintiffs and Appellants Herein. Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, of Counsel.

The foregoing petition is granted and plaintiffs' appeal allowed; [fol. 55] and plaintiffs having given bond as required by this court, it is ordered that the temporary restraining order heretofore issued in this suit be and remain in full force and effect pending said appeal and until the final determination of this cause.

Wm. A. Cant, Judge of the United States District Court.

Feb. 16, 1925.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Feb. 16, 1925

Plaintiffs, in connection with their petition for an appeal in the above entitled cause, present the following assignments of error upon which they will rely in said appeal. The Court erred:

I

In dismissing plaintiffs' bill of complaint and entering a decree for the defendants.

II

In holding that the tax imposed by Chapter 224 of the Laws of Minnesota 1923 is not in violation of Article I, Section 10, of the Constitution of the United States, which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts."

III

In holding that the tax so imposed is not in violation of Article IX, Section 1, of the Constitution of the State of Minnesota, requiring that taxes shall be uniform upon the same class of subjects.

IV

In holding that the tax is not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the state the equal protection of the laws.

[fol. 57]

V

In holding that the tax is a tax on the interest of the lessors in mining properties, if by so holding the court intended to hold that the tax is a tax upon land.

VI

In holding that the tax, if held to be a tax on land, is valid notwithstanding the constitutional provisions above referred to, although mining properties not operated are not subject to the tax.

VII

In holding that the tax, if held to be a tax on land, is valid notwithstanding the constitutional provisions above referred to, although other wasting properties are not subject to the tax.

VIII

In holding that the fact that iron lands are being depleted of their natural wealth furnishes any proper basis for classification under which they may be subject to special and double taxation.

IX

In failing to hold that the tax, if held a tax upon land, operates unequally against the plaintiffs in that no corresponding tax is imposed upon any land other than mineral lands operated on a royalty basis, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

X

In failing to hold that the tax, if a tax upon the sale price or the proceeds of mineral lands or of the iron ore therein, operates unequally against the plaintiffs in that no corresponding tax is imposed upon the proceeds of the sale of any lands other than mineral lands and when such proceeds are received by way of royalties, all in viola-
[fol. 58] tion of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XI

In failing to hold that the tax, if a tax on rents and profits of mineral lands, operates unequally upon the plaintiffs in that no corresponding tax is imposed upon rents and profits except when the same accrue to the owner thereof in the form of royalties, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XII

In failing to hold that the tax, if an income tax, operates unequally against the plaintiffs herein in that no corresponding tax is imposed upon income from any other source, including income derived from mineral lands other than in the form of royalties, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XIII

In failing to hold that the tax, if a tax upon moneys received as royalties, operates unequally against plaintiffs in that no corresponding tax is imposed upon moneys derived from other sources, and that such attempted classification of moneys and credits according to the source from which derived is unreasonable and invalid, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

[fol. 59] XIV

In failing to hold that the tax is a hostile discrimination in the guise of a tax and, therefore, a denial of equal protection of the laws and a taking of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

XV

In failing to hold that the royalties received by the plaintiffs Lake Superior Consolidated Iron Mines and Northern Development Company, received by them in the State of New York, have no situs within the State of Minnesota for the purpose of taxation and are not subject to the tax imposed by said act.

XVI

In failing to hold that plaintiff was entitled to the relief prayed for in the bill of complaint and to enter a decree permanently enjoining the defendants from enforcing the provisions of said act.

C. A. Severance, George W. Morgan, Solicitors for Plaintiff. Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, of Counsel.

[File endorsement omitted.]

[fols. 60 & 61] CITATION—In usual form, showing service on Clifford L. Hilton; filed Feb. 19, 1925; omitted in printing

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[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 13, 1925

It is hereby stipulated and agreed that the Clerk of this Court shall incorporate in the transcript of the record on the appeal in the above entitled cause to the Supreme Court of the United States the following:

1. The amended bill of complaint.
2. The amended answer.
3. The restraining order.
4. Stipulation for hearing and continuing restraining order.
5. Agreed statement of facts, into which was incorporated paragraphs numbered 14 to 22, inclusive, of the agreed statement of facts in the case of Royal Mineral Association, a corporation, plaintiff, vs. Samuel Lord et al., defendants, Equity case No. 99, now also on appeal to the Supreme Court of the United States, which case for convenience was heard at the same time and with the above entitled cause.
6. Agreed transcript of evidence.
7. Opinion of court and order for decree.

[fol. 63] 8. Decree.

9. Petition for appeal and order allowing same and continuing restraining order.
10. Assignments of error.
11. Citation.
12. Stipulation for transcript of record.

Dated this 12th day of March, 1925.

C. A. Severance, George W. Morgan, Solicitors for Plaintiffs. Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, of Counsel for Plaintiffs. Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Joel M. Dickey, Clerk of the above named court, do hereby certify and return to the Honorable The Supreme Court of the United States, that the foregoing consisting of 64 pages, numbered consecutively from 1 to 64, is a true and complete transcript of all the records, process, pleadings, orders and final decree, and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court and in accordance with a præcipe for such transcript, a copy of which is included within said paging; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid and affixed the Seal of said Court at Duluth, in the District of Minnesota, this 14th day of March, A. D. 1925.

Joel M. Dickey, Clerk, by Catherine Neff, Deputy. (Seal of U. S. Dist. Court, Dist. of Minnesota, Fifth Division.)

Endorsed on cover: File No. 30,990. Minnesota D. C. U. S. Term No. 336. Lake Superior Consolidated Iron Mines, Oliver Iron Mining Company, Northern Development Company, et al., appellants, vs. Samuel Lord, J. G. Armson, and Odin Halden, constituting the Minnesota Tax Commission, et al., etc. Filed March 30, 1925. File No. 30,990.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 355

GEORGE L. BURROWS, JR., ALICE B. BEAUMONT, ELIZABETH B. HUNTINGTON, ET AL., ETC., ET AL., APPELLANTS,

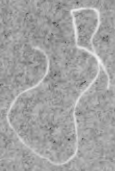
vs.

SAMUEL LORD, JAMES G. ARMSON, ODIN HALDEN, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

FILED APRIL 13, 1925

(31,025)



(31,025)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 355

GEORGE L. BURROWS, JR., ALICE B. BEAUMONT, ELIZABETH B. HUNTINGTON, ET AL., ETC., ET AL., APPELLANTS,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

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[fol. 1] [Caption omitted]

[fol. 2] **IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FIFTH DIVISION**

In Equity

GEORGE L. BURROWS, JR., ALICE B. BEAUMONT, ELIZABETH B. Huntington, Lucy B. Morley, Mary Sage B. Fowler, and Edwina B. Montague, as Residuary Devisees and Legatees of George L. Burrows, Deceased, and George L. Burrows, Jr., and John W. Beaumont, Executors of the Will of said George L. Burrows, Deceased, and Estelle Rust, James G. Macpherson, and Charles J. Reynick, Trustees of the Ezra Rust Mining Property, and Detroit Trust Company, a Michigan Corporation, as Trustee under Trusts Created by Gilbert B. Goff, now Deceased, Plaintiffs.

vs.

SAMUEL LORD, JAMES G. ARMSON, ODIN HALDEN, Constituting the Minnesota Tax Commission; Clifford L. Hilton, Attorney General of Minnesota; Raymond P. Chase, State Auditor of Minnesota; Henry Rines, State Treasurer of Minnesota, Defendants.

BILL OF COMPLAINT—Filed March 11, 1924

[fol. 3] Plaintiffs allege and show to the court as follows:

(1) That plaintiffs, George L. Burrows, Jr., Alice B. Beaumont, Elizabeth B. Huntington, Lucy B. Morley, Mary Sage B. Fowler, Edwina B. Montague, and George L. Burrows, Jr., and John W. Beaumont, executors of the will of George L. Burrows, deceased, and Estelle Rust, James G. Macpherson and Charles J. Reynick, as Executors of the will of Ezra Rust, Deceased, and as Trustees under said will, and Detroit Trust Company, a Michigan corporation, as Trustee under Trusts created by Gilbert B. Goff, now deceased, are and for many years last passed have been and now are residents and citizens of the State of Michigan.

(2) That the defendants, Samuel Lord, James G. Armson, and Odin Halden, constitute the Minnesota Tax Commission of the State of Minnesota; that Clifford L. Hilton, is the Attorney General of the State of Minnesota and Raymond P. Chase is the State Auditor of the State of Minnesota and Henry Rines is the State Treasurer of the State of Minnesota, and all of said defendants are residents and citizens of the said State of Minnesota.

(3) That on, to wit, October 2, 1899, plaintiffs' predecessors in title, George L. Burrows, Ezra Rust and Gilbert B. Goff, each owning an undivided one-third interest in the mineral rights of a certain mine known as the Rust Mine, situated in the town of Hibbing, St.

Louis County, Minnesota, leased the same to Lake Superior Consolidated Iron Mines for a period of 50 years and three months from and after October 1, 1899, a copy of which said lease is hereto attached and marked Exhibit "1". That the lessee's interest in said lease was subsequently assigned to Oliver Iron Mining Company, and said lease is still in force. That under the terms of said lease, the lessees were required to pay to the lessors 25¢ per ton on the [fol. 4] 10th day of January, April, July and October in each calendar year for all iron ore mined and shipped from the said mine during the three months immediately preceding the first day of the month in which the payment shall become due. That said several payments were required to be made at and to George L. Burrows & Company Bank at Saginaw, Michigan, or at and to any other bank in the city of Saginaw, Michigan, or elsewhere, in one of the United States, as the lessors, their executors, administrators or assigns from time to time might designate in writing. That no other place of payment has ever been designated.

(4) That said George L. Burrows, one of the parties to the lease hereinbefore referrred to and owner of an undivided one-third of the mineral covered thereby and one-half of the surface covered thereby, departed this life on the 9th day of November, 1921, leaving the said George L. Burrows, Jr., Alice B. Beaumont, Elizabeth B. Huntington, Lucy B. Morley, Mary Sage B. Fowler and Edwina B. Montague as his children and sole devisees under his will, each entitled to an undivided one-sixth of his estate. That his will was admitted to probate by the Probate Court of Saginaw County, Michigan, and said George L. Burrows, Jr., and John W. Beaumont, were appointed his executors and have duly qualified and are acting as such; that ancillary administration was had and the will was admitted to probate in the Probate Court of St. Louis County, Minnesota, and said George L. Burrows, Jr., and John W. Beaumont, were duly appointed executors of said estate in Minnesota, and said Minnesota estate has been closed, the executors therein discharged and said estate including said mineral rights and the rights of George L. Burrows, deceased, in and to said lease, was duly assigned by said Probate Court of St. Louis County, Minnesota on November 28, 1923, to said six children, plaintiffs herein, in equal shares.

[fol. 5] That said Ezra Rust, one of the parties to the lease hereinbefore referred to, and owner of an undivided one-third of the mineral covered thereby, and of one-half of the surface covered thereby, died on January 3, 1918, leaving a Last Will and Testament, which said Last Will and Testament has been admitted to probate in the Probate Court for the County of Saginaw, State of Michigan, the domicile of said Ezra Rust in his lifetime, and which said will has been admitted to probate in the State of Minnesota;

That the interests of said Estate of Ezra Rust in said lease under said will, belong to Estelle Rust, James G. Macpherson and Charles J. Reynick, as Trustees under said will, and to their successors in said trust;

That said Estate of Ezra Rust has been closed in the State of Minnesota, and that on July 28, 1919, Final Decree of Distribution in said Estate was made in the Probate Court for the County of St. Louis, and that all right, title and interest of said decedent in and to the said lease, and the mineral covered thereby, and of the surface of said lands, was assigned to and vested in Estelle Rust, James G. Macpherson and Charles J. Reynick, as Trustees, and their successors in said trust, according to the Last Will and Testament of said decedent, Ezra Rust, and that said Trustees under said will, are all residents and domiciled in the State of Michigan, and are now collecting said royalties under said lease;

That copy of said will of Ezra Rust, marked Exhibit "2", is hereto attached, hereby referrred to and made a part hereof;

That on March 9, 1911, Gilbert B. Goff (who died September 6, 1911) executed and delivered to Ernest A. Goff, one of his sons, and to his successors in trust, two deeds of trust, each conveying an undivided one-ninth interest in the mineral deposits of the lands cov- [fol. 6] ered by the lease of the Rust Mine and to other Minnesota lands and the royalties derived therefrom, which deeds were recorded in the office of the Register of Deeds of St. Louis County, Minnesota, on November 8, 1911, one in Book 350 of deeds on page 243 and the other in Book 351 of Deeds on page 141; that on February 2, 1914 the said Ernest A. Goff resigned as trustee under each of said trust deeds and on the same date the Circuit Court in Chancery for Saginaw County, Michigan, on application duly made, appointed the Detroit Trust Company, a corporation of Detroit, Michigan, trustee under each of said trusts in the place and stead of said Ernest A. Goff; that on February 3, 1914 said Ernest A. Goff as trustee conveyed to said Detroit Trust Company as trustee all his right, title and interest in and to said trust property pursuant to said trust deeds and the order of said court, and said deeds were recorded on March 2, 1914 in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 378 of deeds on pages 426 and 428; that said Detroit Trust Company accepted said trusts, duly qualified and is now acting as such trustee; that under the terms of said trust instruments, said trustee receives, collects and disburses said royalties. That the beneficiaries under said trusts are all residents of the states of Michigan and California.

(5) That at the 1923 session thereof, the Legislature of the State of Minnesota, passed Chapter 226, H. F. 29 of the Session Laws of that year, which was approved by the Governor on April 11, 1923, and a copy of which is hereto attached and marked Exhibit "4".

(6) That pursuant to said statute the defendants, constituting the Minnesota Tax Commission, required these plaintiffs to file reports [fol. 7] under section 3 of said statute, showing the royalty received during the calendar year 1923 from said mine, and these plaintiffs, on or before February 1st, 1924, filed said reports under protest and duress and threats of penalties, etc., and without admitting the validity of the statute or the liability for said tax, both of which were and are denied. That said defendants are threatening to assess

said taxes against these plaintiffs and their property interests and to certify such taxes in accordance with the provisions of said statute, so as to cause the same to become a lien upon the property interests of these plaintiffs and so cast a cloud upon the title of these plaintiffs, and these plaintiffs aver upon information and belief that said defendants propose to cause suits to be brought against these plaintiffs and their property interests on account thereof and cause a multiplicity of vexatious suits and to interfere with the property rights and privileges of these plaintiffs, unless restrained by the court.

(7) The plaintiffs further allege that the amount of tax which said defendants threaten to levy and collect for the year 1923 against each of the plaintiffs would be upwards of $3,000.00 exclusive of interest, penalties and costs and the amount of tax under said statute which said defendants would attempt to levy against each of the said plaintiffs for each successive year would be upwards of $3,000.00 exclusive of interest, penalties, and costs, and the amount involved in this suit and the value of each of the plaintiffs' interest in said Rust Mine, exclusive of interest, penalties and costs is in excess of $3,000.00.

(8) That said statute provides that such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June and if not paid on or before that date, a penalty of 10% shall immediately accrue thereon and that the [fol. 8] tax shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable and in and to the land, etc., and that on or before the 10th day of June in each year the State Auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty or penalties due thereon and place the same in the hands of the State Treasurer for collection and that the State Treasurer shall within 10 days after the receipt of the draft notify by mail the taxpayer of the amount thereof, and if not paid within 30 days after presentation shall deliver the same to the Attorney General, whose duty it shall be to bring an action thereon in the District Court of Ramsey County for the amount of such draft together with interest and costs and that such tax shall draw interest at the rate of 1% per month commencing 30 days after the same falls due, and the judgment of the court, when so obtained and properly docketed, shall be a lien upon all the right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed and that said lien shall continue without limitation with interest at the rate of 1% per month and the said property may be sold in satisfaction of such judgment.

(9) That plaintiffs allege that said Chapter 226 of the Laws of 1923 is unconstitutional and void for the following reasons, among others:

[fol. 9] (1) It denies to the plaintiffs as citizens and residents of Michigan the privileges and immunities of citizens of the several states

and of the State of Minnesota in violation of section 2 of Article 4 of the Constitution of the United States.

(2) It deprives non-resident lessors of Minnesota iron mines of property without due process of law, in violation of the Fourth and Fourteenth amendments to the Constitution of the United States, and in violation of Section 7 of Article 1 of the Constitution of Minnesota.

(3) It abridges their privileges and immunities, deprives them of property without due process of law and denies to them the equal protection of the laws, in violation of the Fourteenth amendment to the Constitution of the United States, and it violates their right guaranteed by the Fourth amendment to the Constitution of the United States to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

(4) The tax is not as nearly equal as may be, but is grossly discriminatory and in violation of Section 1 of Article 9 of the Constitution of Minnesota in force at the time of the execution of the lease of the Rust Mine.

(5) The property (subject matter of the tax) does not have a cash valuation and hence the tax is in violation of Section 1 of Article 9 of the Constitution of Minnesota in force at the time of the execution of the lease of the Rust Mine.

(6) The tax is not equalized and uniform throughout the state but is discriminatory and hence in violation of Section 1 of Article 9 of the Constitution of Minnesota in force at the time of the execution of the lease of the Rust Mine.

(7) The tax is not levied on all credits and personal property according to their true value in money, and hence is in violation of Section 3 of Article 9 of the Constitution of Minnesota in force at the time of the execution of the lease of the Rust Mine.

(8) The Act violates Sections 33 and 34 of Article IV of the Constitution of Minnesota prohibiting special laws and requiring that all such laws shall be uniform in their operation throughout the state.

(9) The act is retroactive, discriminatory and void for the following reasons:

(a) While the act did not become effective until April 11, 1923, yet it seeks to impose a tax on all royalties received during the calendar year 1923. Under the lease of the Rust Mine royalties are payable on the 10th days of April, July, October and January in each calendar year for all iron ore mined and shipped during the three months immediately preceding the first day of the month in which the payment shall become due. Therefore this act seeks to tax royalties received January 10, 1923, for ore mined and shipped [fol. 10] during the last three months of 1922, and also for royalties received April 10, 1923, for ore mined and shipped during the

first three months of 1923. If the act were otherwise valid (which is denied) it could not be made retroactive to cover royalties received prior to the date of its passage.

(b) The act not only seeks to impose a tax on royalties received prior to its passage, but it also seeks to impose a tax on royalties received during the calendar year 1923 which accrued during the year 1922, and hence prior to the first tax year under the act. Under the lease of the Rust Mine *the installment of royalties received on* or about January 10, 1923, was entirely for ore mined and shipped during the last three months of the calendar year 1922 and hence the act seeks to operate retroactively not only in covering royalties received prior to its passage but in taxing royalties which had accrued as rents or otherwise prior to the first tax year of the act.

(c) The retroactive feature of the act is not only void because it could not operate to impose a tax on transactions arising prior to its passage and prior to the first tax year under the act, but also because it would be discriminatory in that lessors under leases, wherein the royalties were payable in advance, would escape taxation on royalties received prior to January 1, 1923, on account of ore removed and shipped prior or subsequent thereto whereas lessors under leases such as that covering the Rust Mine would be subjected to a tax on royalties for ores removed and shipped during a like period.

(10) The tax is unwarranted by Section 17 of Article 9 of the Constitution of Minnesota in force at the time of the execution of the lease of the Rust Mine, because:

(a) That section does not authorize a tax on mineral lands and another tax on the earnings or rents derived therefrom, but rather authorizes a tax on one or the other if within the jurisdiction of the state;

(b) A tax is imposed by general law upon the property (mineral lands of plaintiffs) and to impose another tax on the earnings, rents or royalties derived therefrom while exempting rents or earnings from all other kinds of real estate, would not only be arbitrary discrimination, but would be double taxation.

(c) That said section seeks to authorize a tax on the property or upon the earnings, but not on both.

(d) The imposition of the general property tax on the Minnesota lands of plaintiffs precludes authority to impose another tax on the earnings, rents or royalties derived therefrom.

(e) While the Minnesota lands are within the state, the earnings, rents or royalties are not.
[fol. 11] (f) The tax is not as uniform as reasonably may be with the taxes imposed on similar property.

(11) That said statute and the amendment to the Constitution of Minnesota violate the Fourth and Fourteenth amendments to the Constitution of the United States, providing against unreasonable

searches and seizures aforesaid and providing that no state shall deprive any person of property without due process of law, nor make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person the equal protection of the laws, and also violates section 10 of article 1 of the Constitution of the United States providing that no state shall pass any law impairing the obligation of contracts. At the time of the execution of the lease of the Rust Mine in 1899, the Constitution of Minnesota provided that taxes shall be as nearly equal as may be, and that property subject to a tax, shall have a cash valuation, and that taxes shall be equalized and uniform throughout the state, and that taxes shall be levied on all credits and personal property according to their true value in money. In 1906, said Constitution was amended and a clause was substittuted therefor providing that taxes shall be uniform upon the same class of subjects. Said lease contains provisions which require the lessee to pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands thereby demised and on the iron ore mined thereon and on all improvements and personal property thereon, while the lease shall remain in force, and also provides that the lessee shall not permit or suffer said lands and property or any part thereof, to be sold at any time for any taxes or assessments, and that said lessee would protect the said lands and the improvements and iron ore in stock pile thereon from all mechanics' or laborers' liens, or other liens, and keep the title to the same free and clear from all clouds and incumbrances arising from such liens, in any way, because of its mining operations thereon or the use or occupation thereof by the lessee. Said lease runs for 50 years and three months and the royalties therein provided for were reduced and made less because of said agreement of the lessee to pay taxes. The amendment to th Constitution of Minnesota and the passage of said act of April 11, 1923, thereunder, impairs the obligation of plaintiffs' contract by hindering, diminishing and destroying the ability of the plaintiffs' lessee to perform and carry out the said contract and impairs the obligation of said contract.

(12) The subject matter of the tax is neither persons, property nor business within the territorial jurisdiction of the state.

(13) Because the situs of said royalties, whether before or after payment, is at all times outside of the State of Minnesota. The lease of the Rust Mine dated October 2, 1899, under which all of the royalties received by plaintiffs were paid, provides that the payments required to be made thereunder shall be made at and to George L. Burrows and Company's Bank at Saginaw, Michigan, or [fol. 12] at and to any other bank in the city of Saginaw, Michigan, or elsewhere in one of the United States as the lessors, their executors, administrators, or assigns from time to time may in writing designate. Neither plaintiffs nor their predecessors in title have at any time designated any other place of payment. If the receipt of royalties is the taxable res then the subject matter of the tax is

not within the jurisdiction of the State of Minnesota because all royalties received under the lease of the Rust Mine are received outside of the jurisdiction of Minnesota.

(14. The tax cannot be sustained as a tax against the person, because these plaintiffs (non-residents of the state) are not within the territorial jurisdiction of the state.

(15) The tax cannot be sustained as a tax against property for the following reasons among others:

(a) Royalties do not become property until paid to the lessor in money at his domicile.

(b) The situs of the credit representing unpaid royalties is at the domicile of the owner and it is not within the power of a state to tax a debt due from a resident to a non-resident of the taxing state.

(c) If the alleged property taxed is the credit representing unpaid royalties, it is invalid as a tax on property, also because it is not equal, and is not based on a cash valuation, and is not equalized and uniform, and is not imposed on all credits, and is not uniform upon the same class of subjects but is grossly discriminatory, and for the other reasons stated herein.

(16) The tax cannot be sustained as a tax against business, because plaintiffs are not engaged in any business in Minnesota.

(17) It cannot be sustained as an income tax because the Constitution of Minnesota does not authorize a tax on incomes; it is not denominated an income tax; it does not purport to be an income tax; and if it were a tax on income it would be void also because it is not general but is discriminatory and also because no provision is made in said act for a deduction for depletion or for a conversion of capital assets, but the act attempts to tax the entire amount of said royalties; and it would be void for the other reasons set forth in this protest.

(18) The act cannot be sustained as an excise tax for the reasons herein stated and for the reason that the plaintiffs are not exercising any privilege, occupation or business within the territorial jurisdiction of Minnesota and for the reason that while the Constitution of Minnesota as amended in 1906 and 1922 authorizes a tax on every person engaged in the business of mining or producing iron ore or other ores in Minnesota as an occupation tax, it does [fol. 13] not authorize an occupation or excise tax on the making of leases of ore or on the granting of permission to mine ore.

(19) The privilege of receiving in Michigan or elsewhere outside of Minnesota income or rents from real estate located in the latter state cannot be made the subject of an excise tax in Minnesota.

(20) As to these plaintiffs, it would result in treble taxation in that the mineral lands which they own are subjected to general property taxes in Minnesota; and the royalties for ore removed,

whether before or after payment, are subject to personal property tax, in the jurisdiction of the plaintiffs' domicile; and this act if valid would subject the rents or royalties to a third tax.

(21) Under the Minnesota statutes now in force and which were in force prior to the passage of Chapter 226, iron ore property is valued for taxation purposes at 50% of its actual value, while the highest valuation of any other property is 40% and farm lands are valued at only 33⅓% of their actual value, and the rate per cent of taxation is the same on the higher valuations as on the lower valuations and hence iron ore properties already are carrying an excessive portion of the burdens of taxation and Chapter 226 is an attempt to impose an additional, unequal and discriminatory burden on such property.

(22) It cannot be sustained as a sales tax because the Constitution of Minnesota does not authorize such a tax and such a tax would be void for want of uniformity and because it is discriminatory in that no tax is imposed on the sales price of any other property and is not imposed on the sales price of ore property except when said sales price is paid and received in the form of royalties.

(23) It is not proper classification but is arbitrary discrimination. The State has no power to classify for taxation, moneys owned by or due to a taxpayer based solely on the source from which said moneys are derived.

(24) If royalties from mining leases are rents paid for the enjoyment of real estate, then the act arbitrarily selects as the subject of the tax, rents derived from mineral land only (and in one part of the act it is apparently limited to rents or royalties derived from iron ore land) and arbitrarily exempts all other rents paid for the use of real estate such as office buildings, residences, apartments, stores, and mercantile establishments, factories, business places, farms, quarries and gravel pits and other mining lands, etc., and all other real estate in Minnesota. It arbitrarily selects rents received from one isolated class of real estate and arbitrarily exempts rents derived from all others.

(25) It does not provide for a hearing before assessment or payment in all cases as required by law.

[fol. 14] (26) It is an interference with and a burden upon interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States.

(27) It impairs the obligation of contracts in violation of Section 10 of Article 1, of the Constitution of the United States.

(28) It is confiscatory.

(29) The subject of the act is not fully and accurately expressed in its title and hence it is in violation of Section 27 of Article 4, of the Constitution of Minnesota.

(30) If the tax could be sustained (which is denied) on the theory that the granting of the lease was a taxable privilege, it could only be sustained as to leases made subsequent to the passage of the law and it could not be made retroactive to cover the granting of a lease executed upwards of twenty-three years prior to the passage of the law.

(31) For the reasons herein stated the royalties are not and could not be the taxable res but are only the measure of the tax levied on something else and if that something else is the granting of the lease, then it follows that the state could not in 1923 impose a tax on the granting of a lease (such as that covering the Rust Mine) in 1899.

(32) If the tax could be sustained (which is denied) on the theory that permission to explore mine, take out and remove ore is a taxable privilege, then the tax is invalid as to plaintiffs because they have not granted such permission, are not exercising such permission and such permission or privilege was parted with by their predecessor in title upwards of twenty-three years before the passage of this act and the beneficiary of such permission or privilege is the lessee and not these plaintiffs. The statute is not retroactive and plaintiffs cannot be taxed now on account of a permission or privilege granted by their predecessor in title twenty-three years ago to a third party.

(33) The tax is discriminatory for the further reasons that:

(a) It is imposed on royalties received by lessors but is not imposed on that portion of the profit of operating fee owners which would be the equivalent of royalties received by them.

(b) It is imposed on royalties received by lessors who do not sell their leasehold interest but is not imposed on the sale price of expected future royalties of those lessors who sell their leasehold interest to their lessees or to others.

[fol. 15] (c) It is imposed on royalties received by lessors but is not imposed on equivalent payments received by fee owners who instead of executing instruments in the form of leases, execute contracts of sale of ore in place for a fixed price per ton.

(d) It is imposed on royalties received by lessors but is not imposed on equivalent payments received by fee owners who instead of executing instruments in the form of leases, sell mineral lands either on the lump sum basis or on the installment method.

(34) The act makes said tax due and payable on June 1, 1924 and imposes a penalty of 10 per cent if not paid on or before said date, but fails to state to whom said tax may be paid, and hence is indefinite and void.

(35) In so far as this act seeks to impose a personal liability for the payment of said tax against non-residents of the state of Minnesota it is unconstitutional and void.

(36) In so far as said act purports to authorize an action to recover the amount of said draft (tax and penalty) interest and costs against non-residents of the state of Minnesota, it is unconstitutional and void.

(37) In so far as said act purports to authorize a judgment to be rendered for the amount of said draft (tax and penalty) interest and costs against non-residents of Minnesota it is unconstitutional and void.

(10) That the plaintiffs although non-residents of the state of Minnesota and citizens of other states, could not remove any actions commenced by the State in said District Court of Ramsey County to the Federal Court inasmuch as the state is not a citizen within the meaning of the removal statutes and if plaintiffs should pay said tax they could not maintain a suit in the Federal or State Courts to recover it without the consent of the State of Minnesota as the State cannot be sued without its consent and no such consent has been or will be given and so far as the requirements of said statute are concerned, any suit so commenced by the State could not be removed to the Federal Court on any other grounds. That there is therefore no adequate remedy at law in the Federal or State courts and the plaintiffs having none such are entitled to equitable relief in the Federal court.

[fol. 16] (11) That this suit and restraining order and injunction applied for herein are brought in good faith and upon proper and reasonable grounds of contest as to the constitutionality and validity of said statute and the plaintiffs are entitled to the protection of this court as against the imposition of said alleged tax, penalties, interest and multiplicity of vexatious suits and the pretended lien and clouds upon their title and the imposition of the same would be inequitable and unjust even though the statute should be held valid.

Wherefore, the plaintiffs pray this Honorable Court for a judgment and decree against the defendants and each of them as follows:

(a) That the said Chapter 226 of the Laws of 1923 being entitled, "An Act providing for the Levy and Collection of a Tax on Royalty Received by the Owner of any Right, Title or Interest in Land Situate in this State for Permission to Explore mine, take out and remove Ore from the Same" be adjudged unconstitutional and void.

(b) That the court grant to the plaintiffs against the defendants and each of them individually and in their representative capacities as officers of the State of Minnesota a temporary restraining order to be replaced by an interlocutory injunction to be granted by an enlarged court of three judges pursuant to Section 266 of the Judicial Code of the United States and that upon a final hearing to be succeeded in turn by a permanent injunction restraining and enjoining such defendants from acting under and in pursuance of or from in any way carrying out or enforcing the provisions of said Chapter 266 of the Laws of Minnesota of 1923 against these plaintiffs.

(c) That the court grant these plaintiffs such other and further [fol. 17] relief as to the court shall seem just and equitable.

Mitchell, Doherty, Rumbe, Bunn—Butler, Solicitors for Plaintiffs. Business Address; 1006 Merchants Nat. Bank Bldg., Saint Paul, Minn. Beaumont, Smith & Harris, Weadock & Weadock, M. J. Cavanaugh, of Counsel for Plaintiffs.

[fol. 18] Sworn to by George L. Burrows. Jurat. omitted in printing.

[fol. 19] EXHIBIT 1 TO BILL OF COMPLAINT

No. 21430

Filed Nov. 16, 1899, at 4 p. m., in Book "V" of Agrmts. Page 126

George L. Burrows et al:

to

Lake Sup. Con. Iron Mines

This indenture made this Second day of October, A. D. 1899, between George L. Burrows (widower) of Saginaw in the State of Michigan, Ezra Rust and Emma B. Rust, his wife of the City of New York in the State of New York, and Gilbert B. Goff and Emily A. Goff, his wife, of Edenville, in the State of Michigan, hereinafter called "the lessors" parties of the first part, and Lake Superior Consolidated Iron Mines, a corporation organized under the laws of the State of New Jersey, hereinafter called "the Lessee," party of the second part, Witnesseth as follows:

First. That the lessors, in consideration of the sum of one dollar to them paid by the lessee, the receipt whereof is hereby acknowledged and in further consideration of the covenants, conditions and provisions of this lease to be kept and performed by the lessee, do hereby let, demise and lease, unto the lessee for the term of fifty years and three months from and after the first day of October in the year of one thousand eight hundred and ninety-nine the following described lands and premises in the County of St. Louis and State of Minnesota, to-wit:

The Southeast quarter of the Southwest quarter of Section 35 in Township 58 North of Range 21 West of the fourth principal meridian; the South half of the Northeast quarter of Section 1, and the south half of the northwest quarter of Section 1, and the south half of the southeast quarter of Section 1; and the southeast quarter of the northwest quarter of Section 2; and the southeast quarter of the Northeast quarter of Section 12; and the northeast quarter of the southwest quarter of Section 12; all the said Sections 1, 2 and 12 being in Township 57 North of Range 21 West of the fourth principal meridian.

Together with all the mining rights, interests and estates of the lessors and each of them, in, of and to all of the said lands and premises, subject, nevertheless, to any and all rights of way evidenced by instruments now of record, through, over or across any part of the said lands and premises, granted to the Duluth Missabe & Northern Railway Company and to the Duluth, Mississippi River and Northern Railroad Company.

It is agreed by the parties hereto that the rights possessed by the lessee under said instruments shall not be terminated by the making of this lease, but shall continue and shall be the same as if this lease had been in force at the execution of said instruments.

The said lands and premises are demised to the lessee for the sole purpose of exploring for, mining, taking out and shipping therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for) which is or hereafter may be found on, in or under the said lands, with the right to the lessee to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon-roads, and all other improvements which are or may become necessary or suitable for the mining or removing of the iron ore [fol. 20] therefrom and the carrying on of mining operations thereon; and the right to cut and use all the timber other than pine-timber which may be upon the said lands, free and without charge, so far as may become necessary for fuel or in the construction of buildings required in the operation of any mine upon the said lands, and for drains, tramways, supports or shafts on or within any such mine, or in connecting the same with any lines of railway over which the said ore may be transported. The term "Merchantable ore" as used in this lease shall be taken to mean such ore as shall be merchantable from time to time as the work of mining progresses.

Second. The lessee hereby covenants and agrees to pay to the lessors a royalty on all iron ore mined and shipped from the said lands while this lease shall remain in force, as follows:

For all iron ore mined and shipped prior to the first day of January A. D. 1900, the royalty shall be at the rate of thirty cents for each gross ton, and for all iron ore mined and shipped on or after the first day of January A. D. 1900, the royalty shall be at the rate of twenty-five cents for each gross ton. As to all iron ore mined and shipped before January 1, 1900, the lessee will pay the royalty to the lessors on or before the twenty fifth day of each month for all ore mined and shipped during the calendar month preceding the first day of the month in which the payment is to be made. As to all iron ores mined and shipped on or after the first day of January, 1900, the royalty shall be due and payable on the tenth days of April, July, October and January in each calendar year (which days are hereinafter called "quarter days"). The payment on each quarter day shall be for the full amount of ore mined and shipped from the said lands during the three months immediately preceding the first day of the month in which the payment shall become due. The premises above described being under lease from the lessors to the lessee herein under instrument of lease reserving royalty at the rate

of thirty cents per gross ton upon an agreed minimum output of twenty thousand tons in each year, and which lease is surrendered simultaneously with the execution and delivery of this instrument, the lessee further covenants that during the year 1899 it will have mined and shipped from the said lands at least twenty thousand gross tons of iron ore, or, in case the ore so mined and shipped in the year 1899 shall be less than twenty thousand tons, the lessee will pay to the lessors advance royalty in such sums as shall, together with the amount paid as royalties for ore actually shipped, amount to six thousand dollars.

The lessee further covenants that in each year during the existence of this lease, after January 1, 1900, it will mine and ship from the said lands at least two hundred thousand gross tons of iron ore as an agreed minimum output, or, in case in any one or more of such years the lessee shall not actually ship from the demised premises the full quantity of said agreed minimum output, the lessee will, nevertheless, pay to the lessors advance royalty, to be treated and considered as ground rent, in addition to the royalty paid for iron ore actually shipped during that year such sum as shall, together with the amount paid as royalty for iron ore actually shipped during the said year, amount to Fifty thousand dollars.

Said advance royalties or ground rent shall be paid quarterly at the times and in the manner herein before provided for the payment of royalties for ore actually shipped.

[fol. 21] If in any quarter year the lessee shall ship less than one-quarter of the agree- minimum output for that year, and in a subsequent quarter of that or of any later year shall ship more than the agreed minimum output for such subsequent quarter, the lessee, in making payment of the royalty on such excess, shall be entitled to credit at the rate of 25 cents per ton up to the amount of royalty previously paid on ore not shipped; and this provision shall apply from quarter to quarter and from year to year until such advance royalty shall be exhausted. If on December 31, 1899, the lessee shall have paid, under the said former lease or under this lease, royalty for a greater number of tons of iron ore than shall then have been actually shipped, the lessee shall be entitled to credit for the amount of such advance royalty at the rate of twenty five cents per ton in the payment of royalty in any subsequent quarter or quarters on iron ore shipped in that quarter in excess of that quarter's minimum.

The obligation of this lease to pay advance royalties as aforesaid shall continue in force without regard to the quantity or quality of iron ore existing on the premises during the full term of this lease or until the same shall be terminated or surrendered or assigned in the manner herein provided; and in case of an assignment of the said lease the obligation to mine or pay for such agreed annual minimum output, as well as all other provisions of the lease, shall bind the assignee as fully as the lessee is bound hereby.

At the time of making each payment of royalty the lessee shall transmit to the lessors an exact statement of the amount of iron ore shipped from the demised premises for the period of which royalty is then paid.

Third. The iron ore shipped from the said premises by the lessee shall be weighed by the railway company transporting the same, and the weights so ascertained by the railway company shall prima facie determine the quantity as between the parties hereto. The lessee will furnish the lessors monthly statements showing the said railway weights of ore shipped and the lessors shall have the right by themselves or their duly authorized agents to inspect, view and test the correctness of the railway company's weights at any time and in such manner as it may seem proper to adopt, it being understood that any errors in these respects when ascertained shall be cognizable and corrected, and any such differences shall be settled and paid for upon the next regular quarter day. And the lessee will, on application, at all reasonable times furnish the lessors with copies of analyses and all information connected with the exploration or development work upon said demised premises, and the lessors shall have the right by themselves or their duly authorized agents to enter upon the demised premises at any time or times to inspect or survey the same and to measure the quantity of ore which shall have been mined thereon or shipped therefrom, provided they shall not unnecessarily or unreasonably hinder or interrupt the operation of the lessee.

Fourth. The lessee covenants to conduct all its mining operations on the said lands in a good workman like manner and in accordance with the requirements of good engineering, and so as not to do or cause or permit any unnecessary or unusual waste or injury to the said premises or inconvenience or hindrance in the subsequent operations of the mines thereon.

[fol. 22] Fifth. The lessee further covenants to pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands hereby demised and on the iron ore mined thereon, and on all improvements and personal property thereon while this lease shall remain in force, and to furnish the lessors with duplicate receipts showing the payment of all such assessments or taxes; provided, however, that the lessee shall always have the right to contest in the courts or otherwise the validity of any such tax or assessments in case it shall deem the same unlawful, unjust, unequal or excessive, or to take such other steps or proceedings as it may deem necessary to secure a cancellation, reduction, readjustment or equalization thereof before it shall be required to pay and discharge the same or any part thereof; but, provided further that the lessee shall not permit or suffer said lands and property or any part thereof to be sold at any time for any taxes or assessments. And upon the termination of this lease, by surrender or otherwise as herein provided, the lessee will peaceably surrender possession of the said lands to the lessors.

The lessee covenants that while this lease shall remain in force and until it is surrendered or assigned in manner herein provided, it will protect the said lands and the improvements and iron ore in stock pile thereon from all mechanic's or laborer's liens or other liens and keep the title to the same free and clear from all clouds and en-

cumbrances arising from such liens in any way because of its mining operations thereon or the use and occupation thereof by the lessee, its agents, servants, employees or contractors.

Sixth. The lessor covenant and represent that the said demised premises are now owned as follows, to-wit: That Gilbert B. Goff is the owner of an undivided one-third interest in the minerals upon the said premises, and that, subject only to the said right of the said Gilbert B. Goff, the said premises are owned in fee, one-half thereof by the said George L. Burrows and one-half thereof by the said Ezra Rust.

The several payments required to be made hereunder shall be made at and to George L. Burrows & Company's bank at Saginaw, Michigan, or at and to any other bank in the City of Saginaw, Michigan, or elsewhere in one of the United States as the lessors, their executors, administrators or assigns from time may in writing designate, and the bank or banks so designated shall be deemed the agent or agents of the lessors respectively for the purpose of receiving, collecting and receipting for such payments.

The payments by this lease required to be made by the lessee shall be made in gold coin of the United States of the present standard of weight and fineness.

Seventh. It is Mutually covenanted between the parties, and this lease is granted and accepted upon condition, that the lessee shall have the right to at any time upon thirty days' notice to terminate this agreement and lease, by giving written notice in the manner hereinafter provided to the lessors, their heirs, executors, administrators or assigns, who will in such case acknowledge in writing the receipt of such notice; and this lease shall terminate thirty days after the giving of such notice, whether the same shall be so acknowledged or not.

[fol. 23] All arrearages and sums, including taxes, which shall be due and payable under this lease up to the time of its termination as set forth in the said notice, must and will be paid by the lessee within thirty days after such termination; and the lessee upon such termination must and will forthwith execute and record in the office of the Register of Deed- of St. Louis County, Minnesota, a formal relinquishment of such lease.

Said notice of termination of this lease may be given by registered letter mailed from any Post Office in the United States, postage prepaid, and addressed to the lessors or their heirs, executors, administrators or assigns at their respective last known places of residence.

And it is further agreed that the lessee shall have the right to assign this lease or to contract with others to work any mine or mines which now are or hereafter may be discovered upon the said lands, or to sub-contract, sublet the same at its option with the same rights and privileges as are herein granted to the lessee, it being expressly understood that any such assignment contract, sub-contract or sublease shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease until and unless the lessors shall in writing consent thereto.

Eighth. This lease is granted and accepted upon condition that if the royalty hereby reserved or the advance royalty or ground rent hereby provided for and agreed to be paid or any part thereof be and remain unpaid after the days and times above specified, and if the same shall remain in default for a period of sixty days, or in case the lessee shall fail to keep any of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty days after the receipt by it of written notice from the lessors specifying the default, neglect and failure complained of, then and from thenceforth and in either of the said events, but not otherwise, it shall be lawful for the lessors, at their option to terminate this lease and to take possession of the said leased premises with or without any previous process whatever, to re-enter and have and possess the same as fully as if no lease had been given to the lessee, and the said lessee and all parties claiming under it shall be wholly excluded therefrom, and this lease shall become and be wholly void and at an end subject to the provisions of Article Nine hereof; and the lessors reserve and at all times shall have, possess and hold a lien for all unpaid balances due hereunder upon all ore mined upon the said premises and upon all improvements made upon the said premises by the lessee.

Ninth. It is mutually covenanted that upon the termination of this lease, whether by the acts of the parties or either of them or by expiration of the term, the lessee shall have sixty days in which to remove all engines, tools, machinery, railway tracks or structures erected or placed by it upon the said premises, provided that all taxes, royalties and other dues shall have been paid and all other conditions performed. But the lessee shall not remove or impair any supports placed in the mines upon such premises, nor any timber or framework necessary to the use or maintenance of the shafts or the approaches to the mines or the tramways within the said mines; and on [fol. 24] failure within the said sixty days to so remove such property all of the same shall belong to and become the property of the lessors.

Tenth. In case ores or minerals other than iron ores shall be discovered upon the said demised premises the lessee shall be and hereby is expressly granted the right to mine and ship the same and the royalty thereon to be paid to the lessors shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges, which transportation charges shall first be deducted from such market value or selling price and retained by the lessee; and such royalty shall be due and payable at the same times and in the same manner that the royalty on iron ores shall be due hereunder, and the quarterly reports of the quality, grade, kind and quantity of such other ores and minerals shall be made at the same times and in the same manner as reports concerning iron ore are required to be made hereunder.

Eleventh. All covenants, conditions and provisions of this lease shall run with the land and shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns, of the lessors and lessee respectively.

In Witness Whereof the lessors have hereunto set their respective hands and seals, and the lessee has caused these presents to be executed in its corporate name by its President or Vice-President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

This lease is executed in quadruplicate and the four papers thus executed shall be deemed but one instrument.

Geo. L. Burrows (Seal), Ezra Rust (Seal), by Geo. L. Burrows, His Attorney-in-fact. Emma B. Rust (Seal), by Geo. L. Burrows, Her Attorney-in-fact. Gilbert B. Goff (Seal), Emily A. Goff (Seal), Lake Superior Consolidated Iron Mines, by F. T. Gates, Pres. (Lake Superior Consolidated Iron Mines Corporate Seal, 1893.)

Attest: Chas. E. Schiede, Secretary.

Signed, Sealed and Delivered in the presence of: As to the lessors: L. A. Burrows, Fred H. Potter; as to lessee: Geo. Welwood Murray, Allen W. Johnson.

U. S. Rev. Stamp, $1.00, Cancelled.

[fol. 25] STATE OF MICHIGAN,
County of Saginaw, ss:

On this Eleventh day of November A. D. 1899 before me a Notary Public within and for said county, personally appeared George L. Burrows, to me known to be the person described in and who executed the foregoing and within instrument and lease and acknowledged that he executed the same as his free act and deed.

Latham A. Burrows, Notary Public. (Seal of Latham Avery Burrows, Notary Public, Saginaw Co., Mich.)

STATE OF MICHIGAN,
County of Saginaw, ss:

On this eleventh day of November A. D. 1899, before me a Notary Public within and for said county, personally appeared George L. Burrows to me known to be the person who executed the foregoing instrument in behalf of Ezra Rust and Emma B. Rust, his wife, and acknowledged that he executed the same as the free act and deed of said Ezra Rust and Emma B. Rust, his wife.

Latham A. Burrows, Notary Public. (Seal of Latham Avery Burrows, Notary Public, Saginaw Co., Mich.)

STATE OF MICHIGAN,
County of Saginaw, ss:

On this eighth day of November A. D. 1899, before me a Notary Public within and for said county, personally appeared Gilbert B. Goff, to me known to be the person described in and who executed the foregoing and within instrument and lease and acknowledged that he executed the same as his free act and deed.

Latham A. Burrows, Notary Public. (Seal of Latham Avery Burrows, Notary Public, Saginaw Co., Mich.)

[fol. 26] STATE OF MICHIGAN,
County of Saginaw, ss:

On this eighth day of November A. D. 1899, before me a Notary Public in and for said county personally appeared Emily A. Goff to me known to be the person described in and who executed the foregoing and within instrument and lease and acknowledged that she executed the same as her free act and deed.

Latham A. Burrows, Notary Public. (Seal of Latham Avery Burrows, Notary Public, Saginaw Co., Mich.)

STATE OF NEW YORK,
County of New York, ss:

On this thirteenth day of November A. D. 1899, before me a Notary Public within and for said county and State, personally appeared Fred T. Gates to me personally known, who being by me duly sworn did say that he is the president of the Lake Superior Consolidated Iron Mines, a corporation duly existing under the laws of the State of New Jersey, and that the seal affixed to the foregoing instrument and lease is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Fred T. Gates duly acknowledged said instrument to be the free act and deed of said corporation.

John Bensinger, Notary Public in and for the County and State of New York. (Seal of John Bensinger, Notary Public, Kings Co., N. Y.)

[fol. 27] EXHIBIT 4 TO BILL OF COMPLAINT

Chapter 226, H. F. No. 29

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this State for permission to explore, mine, take out and remove ore from the same.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Tax on Iron Ore Royalties—Rate.—There shall be levied and collected upon all royalty received during the year end-

ing December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six (6) per cent.

Sec. 2. Definitions.—For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, copartnerships, associations, companies and corporations.

Sec. 3. Annual Reports to Tax Commission.—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

Sec. 4. Contents of Reports.—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

[fol. 28] 1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.

2. The amount of royalty paid on each tract of land separately.

3. The name and postoffice address of each person to whom royalty is paid, and

4. Such other information as said commission may require.

Sec. 5. Tax Commission to Assess Tax.—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the State auditor and a duplicate thereof with the State treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty

shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. Penalties for Non-payment.—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be [fol. 29] added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the State, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. Date of Payment.—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. Tax a Lien on Lands and Ore.—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. Auditor to Make Draft.—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

[fol. 30] Sec. 10. Treasurer to Collect Tax.—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained

and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11. Penalties for False Returns.—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. Records to be Open to Inspection of Tax Commission—Violations and Penalties.—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the pap--- and books aforesaid, he shall be guilty [fol. 31] of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. Taxes to be Paid Into General Revenue Fund.—All taxes assesses, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923.

[fol. 32] EX. 2 TO BILL OF COMPLAINT

I, Ezra Rust, of the City of Saginaw, in the County of Saginaw and State of Michigan, do hereby make, publish and declare this to be my last Will and Testament, intending hereby to dispose of all my worldly estate of which I shall be possessed at the time of my decease, hereby revoking all Wills and all Codicils thereto, heretofore made by me.

First. I direct the payment of all my just debts as soon as practicable, after my death.

Second. I give, devise and bequeath:

(1) To Nicea Howard, Vera Howard and Jesse Howard, of Providence, Rhode Island, and children of Mrs. Anna Howard, formerly Anna Manning, who lived in my family for several years, each the sum of Five Thousand ($5,000) Dollars.

(2) To my niece Mrs. Laura Leonard of Chicago, Illinois, the sum of Five Thousand ($5,000) Dollars.

(3) To the heirs-at-law of my niece, Mrs. Georgia C. Moore, deceased, late of Flushing, Long Island, the sum of Five Thousand ($5,000) Dollars, share and share alike between them.

(4) To my niece, Miss Rosita Birkbeck, of Flushing, Long Island, the sum of Five Thousand ($5,000) Dollars.

(5) To my cousin, Mrs. Carrie E. Tew, of Pasadena, California, the sum of One Thousand ($1,000) Dollars.

(6) To my cousin, Mrs. Florence E. Vroom, the sum of One Thousand ($1,000) Dollars.

(7) To my cousin, Mrs. Carrie E. Pierce of Monmouth, Illinois, the sum of One Thousand ($1,000) Dollars.

(8) To my nephew, George Rust, of Oakland, California, the sum of Five Thousand ($5,000) Dollars.

(9) To Anna E. C. Brater, commonly known as "Lizzie" Brater, who is and has been employed in my house in Saginaw, Michigan, for many years, the sum of Five Thousand ($5,000) Dollars.

(10) To Anna Raschmann, who is now and has been employed in my house in Saginaw, Michigan, for many years, the sum of One Thousand ($1,000) Dollars.

(11) To James Mercier, who is and has been employed in my household for many years, the sum of One Thousand ($1,000) Dollars.

(12) To Henry J. Rumsey, who is now and has been employed in my household for many years, the sum of Two Thousand ($2,000) Dollars.

(13) To Charles J. Reynick, who is now employed in my office, the sum of Five Thousand ($5,000) Dollars.

(14) To Margaret M. Sager, formerly my bookkeeper, the sum of One Thousand ($1,000) Dollars.

(15) To Mrs. Emily J. Mather of St. Clair, Michigan, the sum of Two Thousand Five Hundred ($2,500) Dollars.

(16) To Mrs. Kate E. Rust, Mrs. Mariette Rust and Mrs. Katherine Rust Anstice, widow and daughters respectively of my nephew, Ezra Gardner Rust, the sum of Twenty Thousand ($20,000) Dollars in all, share and share alike between them, individually and not as a class.

(17) To my niece, Mrs. Elizabeth W. Rust of Noblesville, Indiana, the sum of Five Thousand ($5,000) Dollars.

(18) To Mrs. Mary E. Mather, of South Pasadena, California, the sum of Two Thousand ($2,000) Dollars.

(19) To Mrs. Rhea E. Peirsol, of Ann Arbor, Michigan, the sum of Five Thousand ($5,000) Dollars.

(20) To Harold E. Covert, of Ann Arbor, Michigan, the sum of Five Thousand ($5,000) Dollars.

[fol. 33] To St. John's Episcopal Church, of Saginaw, West Side, Michigan, the sum of Five Thousand ($5,000) Dollars.

(22) I give and bequeath to the City of Saginaw, a municipal corporation, the sum of Ten Thousand ($10,000) Dollars, to be used for the repair, improvement or maintenance of Ezra Rust Park

under the direction of the proper city authorities. It was once my intention to devote a larger sum to this purpose, but under changed conditions I have decided to limit my gift to the amount already invested in said park, and this comparatively small bequest toward its repair, improvement and maintenance.

It is my desire and intention that none of the foregoing legacies in this paragraph of this Will, shall fail or lapse by reason of the death of any of the legates named by me prior to my decease; but in case of the death of such legatees or any of them, before me, the heirs of such legatee or legatees so dying, in the absence of any testamentary disposition having been made, shall take the gift in the same manner as though it had become a part of the estate of such legatee or legatees, but if any testamentary disposition shall have been made by such legatee or legatees of his or her estate, then the same shall apply to the gift or legacy herein contained, the same as if such legatee or legatees had died subsequent to my death and the payment of such legacy.

Third. I hereby give, devise and bequeath:

(1) To Ellen S. Slyne, now in Saginaw, the sum of Five Thousand ($5,000) Dollars, should said Ellen S. Slyne survive me.

(2) I give and bequeath to "Bessie" Green, of 820 Hill street Ann Arbor, Michigan, the sum of Two Thousand Five Hundred ($2,500) Dollars, should said Bessie Green survive me.

(3) I give and bequeath to Miss Ida L. Sweet, of the City of New York, the sum of One Thousand ($1,000) Dollars, should said Ida L. Sweet survive me.

Fourth. I direct that the legacies contained in the foregoing Second and Third Paragraphs of this Will shall be paid without interest at any time within one year after my decease, as may be convenient, and if not paid within one year, then the same shall bear interest from one year after my decease, until paid.

Fifth. I hereby give, devise and bequeath to my wife, Estelle Rust, James G. McPherson and Charles J. Reynick, all of the City of Saginaw, Michigan, as Trustees, and to their successors in said Trust, all my right, title and interest of every name, nature and description, in and to the Southeast Quarter (SE¼) of Southwest Quarter (SW¼) of Section 35, in Township 58 North of Range 21 West, of the fourth principal meridian; the South Half (S½) of Northeast Quarter (NE¼) of Section One (1), and the South Half (S½) of the Northwest Quarter (NW¼) of Section One (1), and the South Half (S½) of the Southeast Quarter (SE¼) of Section One (1); and the Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section Two; and the Southeast Quarter of the Northeast Quarter of Section Twelve and the Northeast Quarter of the Southwest Quarter of Section Twelve; all said Sections One, Two and Twelve being in Township 57 North of Range 21 West of the fourth principal meridian, all in the County of St. Louis, State of Minnesota, together with all my right, title and interest in and to one certain mining lease thereon, dated October 2, 1899,

between George L. Burrows, Ezra Rust and Emma B. Rust, Gilbert B. Goff and Emily A. Goff, and Lake Superior Consolidated Iron Mines, a corporation organized under the laws of the State of New Jersey, and the right to collect, receive and recover all rents, royalties and income thereunder from said Lake Superior Iron Mines, its successors or assigns, together with all minerals, mining rights and mineral interest of every kind, name, nature and description, arising or growing out of or connected with said land above described, and the minerals therein, hereinafter for convenience called "Ezra Rust Mining Property," to be held in Trust, however, during the lives of my said wife, Estelle Rust, and my adopted daughter, Maxine Rust, and the lifetime of the survivor of them hereby giving and granting to said trustees and their successors in said trust, full power and authority to carry out the said trust for the following purposes, viz:

(1) To do all acts proper in the management and care of said trust property, and to deduct the expenses of said care and management, and their compensation as trustees;

(2) To pay to my said wife, Estelle Rust, for and during her lifetime, all the net rents, royalties and income from an undivided one-half of said Ezra Rust Mining Property, with all convenient dispatch, after the receipt of the same by them, and upon her death to pay, turn over and deliver to her heirs-at-law, or such legatees or devisees as she may in her last Will and Testament name, to receive the same during the lifetime of this trust, all the net rents, royalties and income from said undivided one-half of said Ezra Rust [fol. 34] Mining Property, and upon the termination of said trust, turn over and deliver to the heirs-at-law of said Estelle Rust, or legatees or devisees designated in the last Will and Testament of said Estelle Rust, to receive the same, said undivided one-half interest in said Ezra Rust Mining Property.

(3) Said Trustees and their successors in said Trust shall, during the lifetime of this trust, turn over and pay all money, rents, royalties and income from an undivided one-half of the said Ezra Rust Mining Property above described, to the trustees of the Maxine Rust Trust created in paragraph Six of this Will and to their successors in that Trust. The said rents, royalties, moneys, and income from said Ezra Rust Mining Property so paid over to said Trustees and said Maxine Rust Trust, and to their successors in said trust, shall thereupon become and be a part of the said Maxine Rust Trust, and be governed by the terms of said Trust, and be disposed of to the persons and in the manner hereafter designated in the provisions for said Maxine Rust Trust.

At the termination of the trust covering the said Ezra Rust Mining Property, I hereby give, devise and bequeath the said undivided one-half of the said Ezra Rust Mining Property, to the lawful issue of the body of my adopted daughter, Maxine Rust, and their heirs, in fee simple, share and share alike between them if there be more than one.

If my said adopted daughter, Maxine Rust, die leaving no lawful issue of her body her surviving, then and in such case at the termination of said Ezra Rust Mining Property Trust, said undivided one-half of the corpus of the said trust shall go to, become the property of, and is hereby bequeathed to the persons next hereinafter in this paragraph designated, and to them and their respective heirs, in fee simple, viz:

(1) One share (one-ninth), to Mrs. Laura Leonard.

(2) One share (one-ninth), to Mrs. Ida McPherson, wife of James G. McPherson.

(3) One share (one-ninth), to my niece, Miss Rosita Birkbeck.

(4) One share (one-ninth), to my nephew, George Rust.

(5) One share (one-ninth), to Mrs. Kate E. Rust, Mrs. Mariette Rust and Mrs. Katherine Rust Anstice, widow and daughters, respectively, of my nephew, Ezra Gardner Rust, share and share alike between them, individually and not as a class.

(6) One share (one-ninth), to Charles C. Sturtz.

(7) One share (one-ninth), to Mrs. Rhea E. Peirsol.

(8) One share (one-ninth), to Harold E. Covert.

(9) One share (one-ninth), to the husband, if any of my said adopted daughter, Maxine Rust, if he be living with her at her death, share and share alike between them, individually and not as a class in fee to them and their heirs respectively. If Maxine Rust leave no husband living with her at her death, said share provided for her husband shall be divided between the other eight shares above designated.

Sixth. I hereby give, devise and bequeath to said Estelle Rust, James G. McPherson and Charles J. Reynick and their successors in this Trust, and undivided one-half of all the rest, residue and remainder of my personal estate, including all moneys, rents, royalties and income from said undivided one-half of said Ezra Rust Mining Property, as paid over to them, as provided for in the fifth paragraph of this Will, In Trust, however, for the following purposes, viz.

(1) To collect from, received and receipt for to the Trustees of said Ezra Rust Mining Property, and their successors in said Trust all the moneys, royalties, rents and income of every name, nature and description, arising, accruing or derived from the undivided one-half of the said Ezra Rust Mining Property hereinbefore described.

(2) To take possession of, hold, manage and care for all money and personal property covered by this Trust, with full power and authority to sell and exchange any or all stocks and bonds and other personal property covered by this Trust.

(3) To pay all taxes, insurance and expenses of every name, nature and description, of caring for and managing all of the property covered by this Trust, including compensation to said Trustees and their successors.

(4) To invest, re-invest and keep invested in income producing securities and property, all moneys, rents, royalties, proceeds, income and personal property coming into their hands from the property covered by this trust, and from the said Trustees of said Ezra Rust Mining Property.

[fol. 35] (5) To pay out of the money and personal property coming into their hands under this Trust, to the legal Guardian of my said adopted daughter, Maxine Rust, until she shall attain her twenty-first year, all such sums of money as from time to time may be necessary to educate, support and maintain my said adopted daughter, Maxine Rust, liberally, according to her station in life, and shall pay:

On July 28, 1926, that being her twentieth birthday, to her guardian, out of the money and personal property in their hands, the sum of Fifty Thousand ($50,000) Dollars, with the discretionary power in them to increase said sum to One Hundred Thousand ($100,000) Dollars.

And shall pay to said Maxine Rust as follows, viz:

On the 28th day of July, 1936, her thirtieth birthday, the sum of One Hundred Thousand ($100,000) Dollars;

On the 28th day of July, 1941, her thirty-fifth birthday, the sum of One Hundred Thousand ($100,000) Dollars;

On the 28th day of July, 1946, her fortieth birthday, One Hundred Thousand ($100,000) Dollars.

On the 28th day of July, 1950, her forty-fourth birthday, all the residue of the trust property covered by this paragraph of this Will, and thereafter shall pay to her during her lifetime all other moneys coming into their possession for her benefit, as rents, royalties or income from said Ezra Rust Mining Property, or otherwise.

In the event that my said adopted daughter, Maxine Rust, shall die leaving lawful issue of her body, her surviving, such issue shall take the place of said Maxine Rust in the ownership and distribution of the property covered by this Maxine Rust Trust, and the same shall vest in said issue at the death of said Maxine Rust, share and share alike between them. If said death shall occur before the termination of said Ezra Rust Mining Property Trust, the Trustees of this Trust, and their successors in this Trust, shall during the existence of said Ezra Rust Mining Property Trust, continue to collect and receive the rents, royalties and income therefrom, and pay the same over to said issue of said Maxine Rust.

In the event of the death of my said adopted daughter, Maxine Rust, without leaving lawful issue to her body her surviving, then and in such case, the rents, moneys, income and royalties from said undivided one-half of said Ezra Rust Mining Property, shall during the lifetime of said Trust, be paid over by my said Trustees and

their successors as soon as practicable after the receipt of the same, to the following named persons, viz:

(1) To my niece, Mrs. Laura Leonard.
(2) To Mrs. Ida McPherson, wife of James G. McPherson.
(3) To my niece, Miss Rosita Birkbeck.
(4) To my nephew, George Rust.
(5) To Mrs. Kate E. Rust, Mrs. Mariette Rust and Mrs. Katherine Rust Anstice, widow and daughters respectively of my nephew, Ezra Gardner Rust, one share, share and share alike, between them, individually, and not as a class.
(6) To Charles C. Sturtz.
(7) To Mrs. Rhea E. Peirsol.
(8) To Harold E. Covert.
(9) To the husband, if any, of my said adopted daughter, Maxine Rust, if he be living with her at her death; share and share alike between them, individually and not as a class, until the expiration of said trust by the death of the survivor of my said wife and adopted daughter, and upon the termination of said mining trust said persons above named shall be entitled to receive the residue of said one-half of said Ezra Rust Mining Property. Upon the death of my said adopted daughter, Maxine Rust, without leaving lawful issue her surviving, all other property covered by the Maxine Rust Trust, shall go to and become the property of and is hereby bequeathed to the persons last above named, share and share alike between them, individually and not as a class. If said Maxine Rust leave no husband living with her at her death, said share provided for her husband shall be divided between the other eight shares above designated.

In case of the death of any of the last above named legatees the heirs of such legatee or legatees in the absence of testimentary disposition by them, shall take the gift in the same manner as though it had become a part of the estate of such legatee or legatees, but if any testimentary disposition shall have been made by such legatee or legatees of his, her or their estate, then the same shall apply to the gift or legacy herein contained.

[fol. 36] Seventh. Excepting and reserving herefrom, the real estate herein above described as the Ezra Rust Mining Property, I hereby give, devise and bequeath to my said adopted daughter, Maxine Rust, and her heirs forever, an undivided one-half of all real estate of which I may die seized and possessed, wherever the same may be situated, including an undivided one-half in my homestead in the City of Saginaw, subject to all homestead rights therein.

Eighth. Excepting and reserving herefrom the real estate herein above described as the Ezra Rust Mining Property, I hereby give, devise and bequeath to my said wife, Estelle Rust, and her heirs forever, an undivided one-half of my real estate, and an undivided one-half of all the residue of my personal property. The provisions herein made for my said wife, Estelle Rust, are in lieu of dower, thirds and statutory rights in real or personal property in her favor.

Ninth. I further will and direct that in the event of any child or children being born to myself and my wife, Estelle Rust, and such child or children surviving me, it or they shall have the same rights in my estate both real, personal and mixed, as if I had died intestate, and the interests of my said wife and said adopted daughter, Maxine Rust, and all beneficiaries herein named, except beneficiaries named in the Second and Third paragraphs of this Will, will be reduced pro rata thereby.

Tenth. All heirs-at-law not herein specifically mentioned are hereby intentionally omitted from participation in my estate.

Eleventh. In the event of the death, total incapacity to act, or refusal to act of any of my said trustees herein named, then and in such case, the two surviving or remaining trustees shall nominate a successor for such deceased or incapacitated trustee or such as may refuse to act, and such successor so nominated by the surviving or remaining trustees shall be appointed as a trustee by the Court having jurisdiction of my estate, which said Court may require from such trustee so appointed, such bond as it may deem necessary to insure the faithful performance of this trust.

In the event of the failure of said remaining or surviving trustees to nominate a successor to such deceased or incapacitated trustee or such as refuse to act for the period of fifteen days after such vacancy shall occur, the Court having jurisdiction of my estate shall have authority to select, nominate and appoint a successor to fill such vacancy. Trustees herein named, shall be required to give only such bond as may comply with the law. Whenever bonds are given by my said trustees or their successors, the expense thereof shall be paid for out of my estate, and I direct that any bonds given by my said trustees shall be corporate surety bonds, approved by the Court having jurisdiction of my estate.

Twelfth. I hereby authorize and empower my said trustees herein named and their successors in said trusts at any time when in the judgment of any two of them, it will be for the best interest of my estate, and the beneficiaries hereunder to surrender their said several trusts herein created, to do so, and in such case they shall account to, turn over and deliver all of said property belonging to my estate and held in trust by them, to a corporate trust company of high standing and financial resources, and named by my said Trustees or their successors, and approved and appointed by the Court having jurisdiction of my estate; upon having accounted for, turned over and delivered to said trustees so appointed, all property in their possession and for which they may be chargeable under this Will, they and each of them shall be forever discharged from said trusts, and their respective successors in said trusts respectively, shall have all the powers and authority herein given and granted to said respective trustees in said several trusts herein designated.

It is my wish that my said trustees in said respective trusts herein named, and their successors, shall act harmoniously, but I further will and direct that any two of my said trustees shall have full

power and authority to do anything herein provided to be done by said trustees and their successors in said respective trusts.

Thirteenth. I hereby nominate and appoint as Executors of this Will, my wife, Estelle Rust, James G. McPherson and Charles J. Reynick, all of the City of Saginaw, Michigan, and request that they be required to give no greater bond or bonds than may be required by law. In the event of the death, total incapacity to act, or refusal of any of said Executors to act, then the remaining or surviving executors shall nominate a successor to such of them as for any reason above specified do not act, which said nominee shall be appointed by the Court having jurisdiction of my estate, as the successor to such incapacitated or deceased executor or person refusing to act, which said executor so appointed, shall give such bond as the Court having jurisdiction of my estate may require; the cost of all bonds given by my said executors, or their successors, shall be paid by my estate.
[fol. 37] In the event of the failure of said remaining, or surviving executors to nominate a successor to such deceased, declining or incapacitated executor for the period of fifteen days after such vacancy shall occur, the Court having jurisdiction of my estate shall have authority to select, nominate and appoint a successor to fill such vacancy.

Fourteenth. I hereby give and grant to the executors of this Will herein named, and their successors, full power and authority to sell all lands, timber and property, both real, personal and mixed, of every name, nature and description, wherever the same may be situated, belonging to my estate, excepting said Ezra Rust Mining Property, on such terms as to all cash, part cash or all credit, as to them may seem best, without the intervention of any court.

I hereby authorize my said executors to invest and re-invest all money, rents, royalties and income from mining leases, mining contracts and mining interests, and from all other sources coming to their possession during their administration of my estate, as such executors, and hereby authorize my said Executors and their successors to sell and exchange any or all stocks, bonds and other securities at any time that may belong to my estate during their administration of my estate, when in their judgment it is for the best interest of my estate so to do.

It is my wish that my executors herein named, and their successors, shall act harmoniously, but I further will and direct that any two of my said executors shall have full power and authority to do anything herein provided to be done by said executors or their successors.

Fifteenth. I hereby further will and direct that as nearly as practicable, my said executors shall close up my estate one year from the date of my death.

Sixteenth. I hereby nominate and appoint as guardian of the person of my said adopted daughter, Maxine Rust, during her minority, my said wife, Estelle Rust, and in the event of the death

of said Estelle Rust during the minority of said Maxine Rust, then I hereby appoint Mrs. Rhea E. Peirsol of Ann Arbor, Michigan, as guardian of the person of said Maxine Rust during her said minority.

In Witness Whereof, I have hereunto set my hand and seal this third day of October, A. D. 1917.

Ezra Rust. [L. S.]

The above instrument, consisting of twelve sheets, was at the date hereof, signed, sealed, published and declared by the said testator as and for his last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses.

Geo. L. Burrows, Jr., Residing at Saginaw, Mich. Charles A. Khuen, Residing at Saginaw, Mich.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed April 5, 1924

The above named defendants for their joint and several answers to the bill of complaint of the plaintiffs in the above entitled cause respectfully represent and state to the court as follows:

[fol. 39]

I

Defendants state that they have no knowledge as to the allegations of paragraph 2 of the bill of complaint, but believe the allegations to be true.

II

Defendants admit the allegations of paragraph 2 of the bill of complaint.

III

Defendants state that they have no knowledge as to the allegations of paragraph 3 of the bill of complaint, but believe the allegations to be true.

IV

Defendants state that they have no knowledge as to the allegations of paragraph 4 of the bill of complaint, but believe the allegations to be true.

V

Defendants admit the allegations of paragraph 5 of the bill of complaint.

VI

Defendants admit the allegations of paragraph 6 of the bill of complaint, except in so far as in said paragraph it is alleged that

the defendants are about to institute vexatious suits and thereby interfere illegally with the property rights and privileges of the plaintiffs, which the defendants deny.

VII

Defendants admit the allegations of paragraph 7 of the bill of complaint.

VIII

Defendants admit the allegations of paragraph 8 of the bill of complaint.

[fol. 40]

IX

Defendants deny the allegations of paragraph 9 of the bill of complaint.

X

Defendants admit that if the plaintiffs should pay said tax they could not maintain a suit in either the federal or the state courts to recover it.

XI

Defendants state that they have no knowledge or belief as to whether this suit and the application for restraining order an injunction herein are in good faith, and deny that the same are based upon proper and reasonable grounds of contest as to the constitutionality and the validity of the statute, and deny that the plaintiffs are entitled to the protection of this court as against the imposition of the tax penalties, interest and liens imposed thereby and the institution of actions provided for therein, and deny that the imposition of the same is inequitable and unjust.

Having thus made full answer to all the matters and things contained in the bill, the defendants pray that the bill be dismissed and for judgment for their costs in this behalf incurred.

Dated March 31, 1924.

Clifford L. Hilton, Attorney General; G. A. Youngquist, Assistant Attorney General; Patrick J. Ryan, Solicitors for Defendants, 102 State Capitol, St. Paul, Minnesota.

[fol. 41] Sworn to by Samuel Lord. Jurat omitted in printing.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed April 16, 1924

Now come the plaintiffs above named and move the Court for an order enjoining, restraining and prohibiting the defendants, until

the hearing and determination of the plaintiffs' motion for interlocutory injunction and until the further order of the Court herein, from acting under or in pursuance of, or from in any way carrying [fol. 43] out or enforcing the provisions of the act of the Legislature of the State of Minnesota, being Chapter 226 of the Laws of 1923, entitled "An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same," so far as the plaintiffs herein are concerned.

Mitchell, Doherty, Rumble, Bunn & Butler, Attorneys for Plaintiffs, 1005 Merchants Natl. Bank Bldg., Saint Paul, Minnesota.

Stipulation

It is stipulated, that the foregoing motion may be brought on for hearing before the Court without further notice and submitted without argument.

Mitchell, Doherty, Rumble, Bunn & Butler, Attorneys for Plaintiffs. Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Attorneys for Defendants.

[fol. 44] In United States District Court

[Title omitted]

Temporary Restraining Order

This matter having come on before the undersigned, Judge of said Court, on the 16th day of April, 1924, at the court rooms in the City of Minneapolis, Minnesota, pursuant to motion of the plaintiffs for a temporary restraining order, and the parties having stipulated [fol. 45] that said motion may be submitted without further notice and without argument, and the Court being fully advised in the premises, and it being made to appear by the averments of the bill of complaint herein that irreparable loss or damage will result to the plaintiffs before the hearing of the plaintiffs' application for an interlocutory injunction can be had unless the defendants herein are, pending the said hearing, enjoined and restrained as prayed for in said bill of complaint;

It is ordered that the defendants and each of them be and are hereby enjoined, restrained and prohibited, either as individuals or as representatives of the State of Minnesota, until the hearing and determination of the plaintiffs' motion for an interlocutory injunction and until the further order of the Court herein, from acting under or in pursuance of, or from in any way carrying out or enforcing the provisions of the act of the Legislature of the State of Minnesota, being Chapter 226 of the Laws of 1923, entitled "An

act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same", so far as the plaintiffs herein are concerned, except that the defendants shall not be enjoined or prohibited from receiving and filing any reports which the plaintiffs may make pursuant to said statute.

Dated at Minneapolis, Minnesota, this 16th day of April, 1924.

Wm. A. Cant, Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND AGREED STATEMENT OF FACTS—Filed April 9, 1924

For the purposes of the trial of the above entitled suit, it is hereby stipulated and agreed by and between the respective parties, as follows:

[fol. 47]

I

That the matters alleged in paragraphs 1, 3 and 4 of the complaint are true and may be taken as proven.

II

That the lessors named in the lease described in the bill of complaint herein and their successors have never designated any other place than Saginaw, Michigan, as the place for payment of royalties, and all royalties under said lease have been transmitted by the lessee from Minnesota and received by the plaintiffs at Saginaw, Michigan, as provided in said lease, including those for the year 1923.

III

All the testimony and evidence received in the case of Royal Mineral Association, et al. vs. Samuel Lord, et al., pending in this court and tried together with this case, and all facts stipulated orally in court in the said Royal Mineral Association case and entered in the transcript of the evidence, shall be considered as having been introduced, received and stipulated in this case, subject to the same objections and conditions as were made in the case of Royal Mineral Association.

IV

It is further agreed that the following facts may stand as admitted, subject to objections as to relevancy and materiality and without the introduction of other evidence, to-wit: All the facts stated and set

forth in paragraphs 14, 15, 16, 17, 18, 19, 20, 21, and 22, of that certain written stipulation or agreed statement of facts made and filed in the case of Royal Mineral Association, et al. vs. Samuel Lord, et al., pending in this court and tried at the same time with this case, and [fol. 47½] for the purposes of this agreement the said stipulation in the Royal Mineral Association case may be referred to and those parts of it made material under this stipulation shall be considered as part of the record in this case, with the same force and effect as if the said stipulation in the Royal Mineral Association case were filed in this cause.

V

All admissions of fact under this stipulation are made without admitting the relevancy or materiality of any such facts and subject to any and all objections which may be offered on those grounds.

Dated April 8, 1924.

Mitchell, Doherty, Rumble, Bunn & Butler, Attorneys for Plaintiffs. Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Attorneys for Defendant.

[fol. 48] The following are the paragraphs referred to in paragraph IV of the foregoing, from the stipulation in the case of Royal Mineral Association et al. vs. Samuel Lord et al.:

14. That in 1923 there were in Minnesota one hundred twenty-four (124) mines in operation (including State owned mines), producing 45,300,000 tons of ore. There were, during the year 1923 in Minnesota four instances in which fee owners, other than these plaintiffs, operated their own properties and sold the ore produced, without receiving or paying royalties thereon; that in two of those instances the operation was largely a cleaning-up process, the mines being near exhaustion, the ore produced from these two properties amounting to approximately 92,000 tons; and in the third instance the operator mined his fee-owned property in connection with adjoining leased property, producing from the former 91,000 tons of ore and from the latter 111,000 tons of ore; and in the fourth instance there remained about 250,000 tons of open pit ore, of which 128,000 tons were removed in 1923 and the remainder of which the owner intends to remove forthwith, and that there remains 3,200,000 tons of underground ore which the owner does not intend to mine for several years to come but does intend to mine later.

15. In very many instances, in fact in the majority of cases where mines are operated, they are operated by lessees who derive the consideration or returns for the ore produced through mining and selling it, and do not receive any returns through royalties paid to them, and this was true in 1923.

16. That the iron ore in the lands of the plaintiffs constitutes the chief value thereof, and that in the case of iron ore deposits as a general rule the entire substantial value thereof consists in such iron ore.

17. That for the year 1923 the total amount of royalties on iron ore reported to the Minnesota Tax Commission was $16,347,004.22, [fol. 49] of which amount approximately $9,538,151.87 was reported as being received by resident owners, excluding from such resident owners foreign corporations, and approximately $1,474,150.58 was reported as being received by corporations foreign to the State of Minnesota, the remaining approximately $5,334,701.77 being reported as received by non-residents of the State.

18. All the known iron mines in the State of Minnesota lie in the northern or northeastern part of the State.

19. That approximately one-half of the mines operated in Minnesota in 1923 were open pit mines and approximately three-fourths of the ore mined in 1923 was taken from open pit mines. In the usual course of mining from open pit mines, the surface is removed and the iron ore mined by the use of steam shovels.

20. At various times two hundred forty-three (243) iron mines, underground and open pit, have been in operation, of which forty-five (45) have been exhausted.

21. That the total tonnage of merchantable ore in Minnesota, according to the figures of the Minnesota Tax Commission in 1923, was approximately 1,300,000,000 tons. That during the year 1923 approximately forty (40) mines owned by subsidiary corporations of a certain corporation in fee were held by those corporations free from lease and were not operated, which mines, according to said figures, contained 344,000,000 tons of such ore. Seven (7) such mines were so held by one of such subsidiaries, which is an operating company, which was during said year engaged in mining, and that the present intention of said operating company is to mine said properties and not to lease them. The remaining mines above referred to were in 1923, and previously, owned in fee by said subsidiary corporations of the parent corporation, and prior to 1923 many of the mines were operated by said operating company under arrangements between said operating company and said other subsidiary corporations, which arrangements did not in any instance involve the payment of any royalty by said operating company to any such owning subsidiary [fol. 50] corporation. During 1923 one mine was operated under such arrangement, and it is the present intention of said corporations to continue the said practice of operating their said mines under the aforesaid arrangements, not involving the payment of royalties.

22. During the last few years preceding 1923 there have been a number of instances in which iron ore properties not subject to lease have been sold outright and the fee transferred for a cash consideration, and a number of instances in which the fee of iron ore properties has been purchased by the lessee and the lease thereon cancelled. In 1923 there were at last two, and possibly more, instances in which fee owners of iron ore land which was not subject to lease sold the same for a cash consideration, or its equivalent, one of which consisted in the purchase of an undivided one-sixteenth in-

terest in fee by a company which already held a lease on the remaining fifteen-sixteenths interest. There was one instance in 1923 where an undivided eleven-thirty-seconds of the interest in fee was sold subject to an existing lease, the purchaser of said undivided fee interest and the lessee under said subsisting lease being companies having the same stockholders. There was another instance in 1923 of the sale of the fee interest, which is described in the agreed statement of facts in Bardwell, et al., v. Sargent Land Company, et al., tried herewith.

[fol. 51] UNITED STATES DISTRICT COURT

[Title omitted]

Agreed Transcript of Evidence—Filed March 28, 1925

CAPTION

The above entitled cause came on for trial and determination on the merits before the Honorable William A. Gant, Judge of said Court, at Saint Paul, Minnesota, on April 7, 1924. Messrs. Beaumont, Smith & Harris; Weadock & Weadock; and Mitchell, Doherty, [fol. 52] Rumble, Bunn & Bulter appeared for the plaintiffs, and Messrs. Clifford L. Hilton, Attorney General, G. A. Youngquist, Assistant Attorney General, and Patrick J. Ryan appeared for the defendants.

The following is a summary statement of the evidence offered and other proceedings had upon the trial, all of the witnesses named being called on behalf of the plaintiffs:

ERNEST S. MCGOWAN, of the Sales Department of The Universal Portland Cement Company, residing in Minneapolis, Minnesota, testified he has been engaged in that business for eighteen years and it is part of his work to keep track of the location of good sand and gravel in connection with the sale of cement. From 750,000 to 1,000,000 yards or tons of gravel are used in the State of Minnesota per year in connection with the making of concrete and the use of cement, and upwards of 4,000,000 yards or tons for all purposes, including road work. Deposits of gravel are found in about one-half of the various localities in the state. A greater part of them are leased on a royalty basis. It is the exception rather than the rule that any other method is used. The royalty rate is usually about ten cents per yard, but in some cases it is fifteen cents and occasionally as high as twenty-five cents. It is common, as to comparatively large gravel pits, that a minimum payment per year, whether gravel is taken or not, is provided in the lease. The method of mining gravel is similar to the method of mining iron ore by open pit operations. The gravel requires a washing operation to remove soil, clay, etc., and hence is very similar to the open pit iron ore operation where

the ore requires beneficiation. Gravel pits vary in depth from a few feet to sixty or seventy feet.

On cross examination witness testified that there are about forty large commercial pits in the state. It was his impression that nearly [fol. 53] all of them are operated under lease. He had not ever personally examined any of those leases.

CHARLES H. YOUNG, Secretary of District #19, National Sand & Gravel Association, testified that he is a resident of St. Paul with an office in Minneapolis, and is president of Robbins, Young & Co., and operator of Landers, Morrison & Christenson Co., both companies being sand and gravel operators, and witness has been in that business for ten years. There are more than forty commercial gravel pits of considerable size in the state. A number of them, three of the largest, are operated on a royalty basis and with the others it is quite general. The royalty usually runs from five cents up. His own companies own their properties. Gravel is found in commercial quantities in about one-half of the various localities in the state. Merchantable gravel should have a depth of from 20 feet up to about 70 feet. The annual production of gravel in the State of Minnesota for all purposes is in excess of 5,000,000 yards per year, of which over one-half is handled on a royalty basis, although he does not think he has personally inspected any of the leases; he is not sure. Where gravel is to be used for ordinary gravel roads it is not washed. When it is to be used for concrete it is washed.

PHIL MCCAULEY, a civil engineer, testified that he has been practicing his profession for fifteen years and has been in the Minnesota Highway Department for three years with title of right of way engineer. A part of witness' duties is the leasing of gravel pits in connection with the construction of trunk highways. The state in the last few years, in connection with the Highway Department, has been using from 500,000 to 1,000,000 tons or yards of gravel per year. The gravel is obtained in four methods: (1) The principal [fol. 54] method is by what is called a patrolman's permit for a small amount of gravel on a royalty basis; (2) where a large quantity is wanted and the state has an exclusive right to it at so much per yard; (3) where a pit is leased for a period of years on a royalty basis; (4) where the pit is bought outright. About seventy-five per cent of the gravel is obtained on a royalty basis under the three methods first mentioned. The state now has about 1,500 to 1,800 gravel leases, including patrolmen's permits, on a royalty basis. The royalty runs from three cents up to thirty-five cents. In extreme cases it has been fifty cents, but that lease has been discontinued. It is generally from five to seven cents a cubic yard. Some of the leases provide for a minimum payment whether gravel is taken in a given time or not.

On cross-examination the witness testified that all of the gravel

beds leased by the state were used for the purpose of furnishing gravel for state highways. Of the gravel pits that he has knowledge of in the state, particularly the larger pits, many are held and owned by railroad companies in connection with their work in keeping up their railroad business. Pits which are operated for the furnishing of gravel for purposes other than state, county or city road work or for railway purposes are comparatively few. At the height of the season there are about 1,000 patrolmen employed on the state highways.

JOSEPH SHIELY, of St. Paul, Minnesota, testified that he is producer of mineral aggregates, sand, gravel and crushed rock, that he is president of J. L. Shiely Company, and is Secretary and Treasurer of National Sand & Gravel Association. The bulk of gravel in the state is handled on a royalty basis. His company last year pro-
[fol. 55[duced 225,000 yards or nearly 300,000 tons, all from pits located within the city limits of St. Paul. They operate on a royalty basis, paying fifteen cents per cubic yard. There are several rock quarries in the State operating on a royalty basis. Witness has had some experience with the method of mining iron ore by the open pit method, having been employed at one time by Butler Brothers when the Cyprus Mines were open at Carson Lake, Minnesota. When iron ore is mined by the open pit method and ore is washed to make it marketable, the process as to machinery and plant equipment is very similar to that used in operating a gravel bed. Gravel bed leases generally provide a minimum royalty payment whether gravel is actually mined or not. There are instances where there are sub-leases of gravel beds, the sub-lease providing for a higher royalty than the underlying lease. The annual production of gravel in Minnesota for commercial purposes, not including gravel used for highway purposes taken from pits used or purchased for that purpose, runs about between 2,000,000 and 3,000,000 tons. Commercial gravel, washed, screened and crushed, is worth $1.25 per ton f. o. b. St. Paul or Minneapolis.

CHARLES HAYDEN, Assistant Right of Way Land and Tax Commissioner of the Great Northern Railway Company, testified that he has held that position with the railway company for more than 20 years and in that connection has had to do with the leasing of gravel pits for the railway company. The railway company has leases of gravel pits made to others on a royalty basis.

D. E. WOODBRIDGE, mining engineer at Duluth, Minnesota, testified that he has recently made an investigation in the state offices and that the State of Minnesota, as lessor, has outstanding at the
[fol. 56] present time eleven leases on gravel beds and has had a total of thirty since 1921. All of the present eleven are on the basis of a royalty of five cents a yard. On those which have terminated

the royalty has run from five cents to twenty-three and a half cents. Five of the eleven leases are to the county commissioners of St. Louis County, two to people in Hibbing, two to people in Chisholm, and two to people in Kinney.

In comparing the operation of iron mines and gravel pits, the first thing in both is exploration for quantity and quality. This is done in both cases either by drilling or test pitting, the properties are then stripped and the ore or the gravel is mined by mechanical process such as steam shovels, drag lines or the like. The general process of washing iron ore is to pass it through screens. The general process of washing gravel is also to pass it through screens. The coarse ore is crushed and the coarse gravel is crushed.

JOHN L. WATSON, Right of Way Commissioner of the Northern Pacific Railway Company, St. Paul, Minnesota, testified that it has been customary for his railroad to make leases on gravel pits on a royalty basis, of which they have three outstanding at the present time. These leases provide for an annual minimum payment whether any gravel is taken or not. The rate varies from five cents to ten cents per yard.

HECTOR MACCRAW, Mineral Clerk of the Minnesota Tax Commission, testified that according to the report of his department the total tonnage of the known merchantable iron ore on state owned land in December, 1922, was approximately 150,000,000 tons, with a total of 84 mining leases outstanding. For ore mined during the year 1923 the state was paid in royalties approximately $1,955,805.40. [fol. 57] Most of the state leases are on a twenty-five cent royalty basis. The royalty paid in 1923 represents a tonnage mined of about 5,000,000 tons during that year. About one-tenth of the known merchantable iron ore in the state belongs to the State of Minnesota.

It was stipulated in the evidence that royalty rates in iron mining leases in the State of Minnesota vary from 12½c. to $1.25.

It was further stipulated that it was understood that the sand and gravel witnesses testified that royalties on sand and gravel leases were actually paid during the year 1923.

It was further stipulated that it has been the practice in Minnesota for many years to lease real estate such as business lots in cities on long time leases for rentals payable from time to time in cash and that this was true during 1923.

It was further stipulated that agricultural lands were, during 1923, and for many years last past had been, often and customarily leased for rentals, cash or otherwise in the State of Minnesota.

It was conceded that Chapter 226, General Laws of Minnesota for the year 1923 was the only statute providing a tax on rentals in the State of Minnesota.

It was also conceded by counsel for the defendants that the court had equity jurisdiction.

It is further stipulated and agreed that the foregoing transcript of evidence and proceedings had in the above entitled cause is a full, complete and correct statement thereof.

[fol. 58] Dated this 21st day of March, 1925.

Beaumont, Smith & Harris, Weadock & Weadock, Mitchell, Doherty, Rumble, Bunn & Butler, Solicitors for Plaintiff.
Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Solicitors for Defendants.

JUDGE'S CERTIFICATE TO STATEMENT OF EVIDENCE

The foregoing transcript of evidence is found to be true, complete and properly prepared, and is hereby approved.

Dated this 28th day of March, 1925.

Wm. A. Cant, Judge of United States District Court.

[fol. 59] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE RESTRAINING ORDER—Filed May 2, 1924

The oral stipulation heretofore made between the parties hereto that the said cause should be heard and determined on the merits by the Honorable William A. Cant, Judge of said Court, at Saint Paul, Minnesota, on April 7, 1924, at ten o'clock A. M. or as soon [fol. 60] thereafter as counsel could be heard, is hereby ratified and confirmed, the cause having been heard at said date.

It is further stipulated that the restraining order heretofore issued herein shall remain in full force and effect pending said determination of the issues on the merits, in lieu of an interlocutory injunction pursuant to the requirements of the Act of Congress relating thereto, the application therefor, hearing thereon and determination thereof by three judges being hereby expressly waived.

Dated April 23, 1924.

Mitchell, Doherty, Rumble, Bunn & Butler, Attorneys for Plaintiffs. Clifford L. Hilton, Attorney General; G. A. Youngquist, Asst. Attorney General; Patrick J. Ryan, Attorneys for Defendants.

[fol. 61] UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed Jan. 16, 1925

The memorandum filed herewith in the case of Royal Mineral Association, et al. vs. Samuel Lord, et al., is adopted and made a part of this case.

Let decree in the above entitled suit be prepared in accordance herewith, and let such decree provide that the temporary restraining order in said suit heretofore issued be and remain in full force and effect for the period of sixty days after the entry of such decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge United States District Court.

[fol. 62] Memorandum

During the year 1921, the Legislature of the State of Minnesota, enacted Chapter 223 of the laws of that year. This Act provided for the levy of a tax payable annually and amounting to six per cent of the valuation of all ore mined or produced within the State during the calendar year. Under the Act, such valuation is ascertained by making certain deductions from the value of such ore at the place where the same is brought to the surface of the earth. Among such deductions is: "4. The amount of royalties paid on the ore mined or produced during the year." This is an occupation tax. Oliver Iron Mining Co. vs. Lord et al., 262 U. S. 172. It is collectible by suit against the person from whom the same is due the same as other demands are enforceable.

During the year 1923, the legislature of that State enacted Chapter 226 of the laws of that year. This Act provides that "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine and take out and remove ore from land in this State, a tax of six (6) per cent." By Section 8 of the Act, this tax is made a specific lien on the interest of the person from whom the tax shall be due, in and to the land on account of which the royalties are paid. Provision is also made for collection of the amount due by suit and by a sale thereunder of the interest in such land held by the person from whom the tax shall be due.

Various persons and corporations who are in receipt of royalty from ore lands in said State urge that the tax imposed under Chapter 226, supra, is in violation of certain provisions of the Constitution of the State of Minnesota, and of certain other provisions of the Constitution of the United States, and they have brought a number of actions, of which this is one, to enjoin the enforcement of the tax.

In a large way, the question is whether the Act runs counter to any of the constitutional provisions which have been invoked.

The important provision of the State constitution which is involved, is that "Taxes shall be uniform upon the same class of subjects." Article 9, Section 1.

The important provisions of the Constitution of the United States which are involved are found in that part of the Fourteenth Amendment, which reads: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Other constitutional provisions have been discussed on the argument and in the briefs. Without overlooking or minimizing the force of any of them, it may be said that they are either involved in a discussion of the specific provisions above set forth, or they yield to the argument which may be made against them. It is urged, for example, that the Act violates that provision of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts." Article 1, Section 10. Giving the argument in that behalf due weight and consideration, it does not appear that the provision referred to is applicable here. The laws as to taxation [fol. 63] and the amount of the levy in any particular year are subject to constant change. All contracts are made subject to the right and the power of the State to make such modification in the laws with respect to future taxation as may seem necessary. Contracting parties may not in effect agree that the State shall not modify its revenue laws, or shall not either increase or diminish the burden of taxation. If the enactment in question is otherwise valid, it will stand as against this objection.

Speaking generally, unless the Act in question is invalid as against the uniformity clause of the State Constitution, with reference to taxation, above quoted, or as against the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, above quoted, it must stand. These provisions and the discussion thereunder are closely related in a case of this kind. The matter may be reduced to still lower terms. The question is whether this court should hold that the classification, royalties, adopted by the legislature of the State of Minnesota, as a basis of taxation, or for the computation of the tax under Chapter 226, Laws of Minnesota, 1923, is invalid, and that the tax levied pursuant thereto is void.

1. The following rules are specially applicable to the uniformity clause of the State Constitution:

(a) Where that clause is invoked in advance of a decision by the Supreme Court of the State, holding a state law to be in violation thereof, Federal Courts will not so declare, unless such holding shall be imperatively necessary. If there has been no decision by the Supreme Court of the State, the Federal Court will seek to an-

ticipate what the holding of the State Court would be, and will decide accordingly.

Louisville & Nashville R. R. Co. vs. Garrett et al., 231 U. S. 298, 305;
Pelton vs. National Bank, 101 U. S. 143, 144;
Pullman vs. Knott, 235 U. S. 23, 27;
Michigan Central R. R. Co. vs. Powers, 201 U. S. 245, 291;
Coulter vs. Louisville & Nashville R. R. Co., 196 U. S. 599, 609.

(b) The two cases last above referred to clearly indicate that the Federal Courts are especially loth to interfere where the Act in question involves the revenues of the State.

(c) The Supreme Court of the State of Minnesota has not passed upon the validity of the Act in question.

(d) The holdings of the Supreme Court of the State of Minnesota, as respects classification for the purpose of taxation, are that the legislature has a very wide range of discretionary power. Mutual Benefit Insurance Co. vs. County of Martin, 104 Minn. 179, 181. State vs. Royal Mineral Ass'n., 132 Minn. 232, 235. There are well recognized limitations to this power which serve as guides in the exercise thereof. "The classification must be reasonable, and such as is suggested by essential differences of nature, situation, or circumstances, or by characteristics which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, and impracticable to apply thereto [fol. 64] the ordinary methods of taxation."

Mutual Benefit Insurance Co. vs. County of Martin, 104 Minn. 179, 181, 182;
State ex rel. St. Paul City Ry. Co. vs. Minnesota Tax Commission, 128 Minn. 384.

2. The following rules are applicable to cases where the due process clause or the equal protection clause of the Fourteenth Amendment is invoked, or where one or both of those clauses and the uniformity clause of the State Constitution are involved.

(a) Under all the authorities the classification must be a reasonable one and such as essential differences suggest.

State ex rel vs. Minnesota Tax Commission, 128 Minn. 384;
Gulf Colorado & S. F. Ry. Co. vs. Ellis, 165 U. S. 150, 155;
Southern Ry. Co. vs. Greene, 216 U. S. 400, 417.

(b) The decided policy of the Supreme Court of the United States when the foregoing clauses are invoked, is to announce and enforce the rule allowing State legislatures a wide discretionary power with respect to classification for purposes of taxation. Bell's Gap Ry. R. Co. vs. Penn, 134 U. S. 232.

"Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney as Admr. vs. Comptroller, etc, 222 U. S. 525, 536. The State is not

bound by any rigid equality." Citizens' Tel. Co. vs. Fuller, 229 U. S. 322, 331."

"Any classification is permissible which has a reasonable relation to some permitted end of Governmental action. It is not necessary * * * that the basis of the classification must be deducible from the nature of the things classified * * *. It is enough, for instance, if the classification is reasonably founded in 'the purpose and policy of taxation."

Watson vs. State Comptroller, 254 U. S. 122, 124, 125;
Heisler vs. Thomas Colliery Co. 260 U. S. 245, 255.

"Passing on that amendment (the 14th) we have repeatedly decided * * * that it does not take from the States the power of classification, and also that such classification need not be either logically appropriate or scientifically accurate. * * * A wide range of discretion, therefore, is necessary in legislation to make it practical." District of Columbia vs. Brooke, 214 U. S. 138, 150."

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment. Middleton vs. Texas Power & Light Co. 249 U. S. 152, 157."

[fol. 65] Without extended discussion, the same view is taken in National Paper & Type Co. vs. Frank K. Bowers, Collector, U. S. Supreme Court, Dec. 15, 1924.

The equal protection clause of the Fourteenth Amendment does not prohibit double taxation by the States.

Shaffer vs. Carter, 252 U. S. 37, 58;
Cream of Wheat Co. vs. Grand Forks, 253 U. S. 325, 330.

(c) The limitation upon this power of classification is that "It must not be exercised in clear and hostile discrimination between particular persons and classes."

Citizens' Tel. Co. vs. Fuller, 229 U. S. 322, 331;
Heisler vs. Thomas Colliery Co. 260 U. S. 245, 255;
Bell's Gap. R. R. Co. vs. Penn. 134 U. S. 232, 237."

(d) In Dawson vs. Kentucky Distilleries Co. 255 U. S. 288:

(1) The Court was dealing with a nondescript imposition from the beginning.

(2) The basis of the alleged classification and tax was elusive, shifty and unsatisfactory. It was not uniform on property of essentially the same class.

(3) The Act "Imposed upon every person engaged in the business of manufacturing whisk-y, or in the business of owning and storing the same in bonded warehouses within the State, what was called an 'annual license tax' of fifty cents a gallon upon all whisk-y either withdrawal from bond or transferred in bond from Kentucky to a point outside the state."

(4) Though called an annual license tax in the Act, the imposition was held to be a tax on the property.

(5) On the argument it was conceded by the authorities seeking to uphold the tax, that if it was a tax on property, the same was void.

(6) In view of the concession so made, the question of classification was not given extended discussion by the Court.

3. Various facts bearing upon the propriety and justice of the classification here involved must be considered.

The iron deposits constitute a very substantial part of the easily available great natural wealth of the State of Minnesota. Development and operation of iron mines, a highly necessary and important industry, means at the same time the exhaustion of that wealth. Such exhaustion attends also the removal of the products of stone quarries and of gravel beds and the cutting and removal of certain kinds of timber. Generally, the development and successful prosecution of any enterprise increases the taxable wealth of the State. In large part, the products of quarries, gravel beds and forests remain within the State and in some form serve as the basis of taxation therein. With respect to iron ore, however, practically all that is mined is being transported beyond the limits of the State. Great [fol. 66] natural wealth which serves as the basis of taxation is annually being withdrawn therefrom. Of necessity the revenues of the State will be substantially affected thereby.

4. Without doubt, when the Legislature of 1923, met and considered problems of taxation, it knew of Chapter 223, Laws of 1921, State vs. Klasen, 123 Minn. 382. That Act was presumably valid. On its face, it pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of six per cent. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The legislature found this latter class already carved out by the earlier Act. In 1923, the general purpose apparently was to assure the State a return of a full six per cent less certain minor deductions, on the value of all ore mined and brought to the surface of the earth. And the further general purpose apparently was to adjust this burden equitably as between the two classes of interests concerned in the operation where the mine was being operated by a lessee. One of these classes, represented by the operator, was specified in Chapter 223, supra, and the tax burden by that Act was imposed thereon. The other interest, represented by those receiving royalties was specified in Chapter 226, Laws of 1923, and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter. In the consideration of this case, it is neither possible, nor proper to divorce entirely the two acts which have been referred to. Either separately, or together, they indicate the policy of the State with reference to the taxation of the interests therein specified.

5. The Federal Constitution does not require that the two classes above referred to should have been covered by the same enactment, or that the two together should have exhausted the subject and covered the entire field. "The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment." Supra.

6. The basis of classification which may be invoked in support of Chapter 226, is the circumstance or condition that, of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration. The desire of the legislature was to reach the interests involved in property of that class and apply thereto a special tax. If such lands may properly be placed in a class by themselves, the rest is a matter of identifying the interests therein for the purpose of taxation. This latter may be called classification of such interests, but it is little more than identification thereof—a pointing out and specifying of the particular interests sought to be taxed.

7. We are concerned to learn whether there are reasonable grounds for this classification, and whether under the provisions of the Act, all within the class involved in Chapter 226, may be treated alike. [fol. 67] The burden on the plaintiff to answer one or both of these questions clearly in the negative. If there has been no "clear and hostile discrimination between particular persons and classes," the law should stand.

Having in mind the real basis for the classification adopted, the fact that other mining properties, not in process of being wasted or depleted, are not included under the provisions of the Act, is not important. This is true whether they are being sold and transferred from time to time, like other property, or are not. With the lapse of time, as such properties come within the class contemplated, the Act will apply. In time, presumably, all ore-bearing properties of substantial value in the State will become subject to the provisions of the law in question.

Chapter 226 is not invalid, because it may be subject to technical criticism, or will not work with perfect nicety of detail, or because conditions may be thought of which would seem to involve differences and inequalities.

"The difference, however, is one such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases and cannot be regarded as an unfriendly or unreasonable discrimination."

Shaffer vs. Carter, 252 U. S. 37, 57.

In Oliver Iron Mining Co. vs. Lord, et al. 262 U. S. 172, 181, the Court says: "It is also said that the royalty provision and others respecting taxes will work a discrimination as between lessees in that some will be subjected to a higher tax than others. No doubt, there will be differences in the amount, but they will result from differ-

ences in situation and not from differences in treatment. Some lessees pay higher royalties than others and will secure a higher deduction on that score. * * * In short, the tax is to be adjusted to the value of the output, less the major expenses of the business, and this according to uniform rules. We, therefore, cannot say that it is intended to, or will work any arbitrary or unreasonable discrimination as between different lessees."

The circumstance that during the year 1923, plaintiff may have been assessed under the head of "Money and credits," on account of funds then on hand and received as royalties during that year, falls within the foregoing observations and authorities.

The fact that other wasting properties, such as stone quarries, or gravel beds, or certain timber areas are not included in the Act here under consideration, does not invalidate the classification. They might have been included, but the differences and distinctions between them and that which was included, justifies their omission. The differences upon which to base a classification "Need not be great or conspicuous." Supa. Anthracite coal may be classified separately from bituminous coal. Meat packing may be classified separately from the packing of other food products. A special tax may be imposed on dealers in certain specified articles, while dealers in other articles go free.

Heisler vs. Thomas Colliery Co. 260 U. S. 245;
Armour Packing Co. vs. Lacy, 200 U. S. 226;
Southwestern oil Co. vs. Texas, 217 U. S. 114, 121.

[fol. 68] 8. The legislature has made the classification, First, in a class by themselves, are the ore lands which are in process of being mined, and, therefore, depleted, and which within a comparatively brief time will be lost to the State as a source of revenue. This clearly distinguishes these lands from other lands in general and from other ore lands in particular. The distinction is based on grounds which have a legitimate relation to the question of taxation. Facing the depletion of certain lands and the loss of their value, the State might be justified in imposing a heavier tax thereon during the intervening time, knowing that when that time should elapse there could be no further substantial tax at all. There is no apparent difficulty in making the classification or in according uniformity of treatment in connection therewith.

9. Next is the identification of the separate interests here involved for purposes of taxation, or the classification thereof. As already indicated, as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator who does the mining, and the owner whose ore is being mined, and the respective interest of each. The interests of an intervening lessee are identified with those of the owner for the purposes here in mind. Although together, the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. So great is that difference that one class, or set of interests

may be taxed without the other, as was done by the Act of 1921, and doubtless, different rates of taxation may be imposed, and, as will be seen, different forms of tax may be levied thereon. There is no practical difficulty in recognizing these two classes as separate and distinct for purposes of taxation, and in according uniformity of treatment to all within each class. It is a matter largely of specifying interests, very different in character, which it is sought to reach for purposes of taxation. One is dealt with in the Act of 1921. The right to select that interest as the basis for the imposition of a separate tax is recognized in Oliver Iron Mining Co. vs. Lord et al., supra. Although the tax under the Act of 1921, is an occupation tax, the same is levied because of the operator's relation to the land, and in the last analysis, because of his interest therein. By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases where there is but one ownership, the tax is imposed under the Act of 1921.

10. In a case where it is clearly made out that a law is unconstitutional, the Court should not hesitate to so declare. If such proof shall not be made, or if the matter is left in doubt, the law should stand. Invoking now and applying some of the basic rules hereinbefore set forth—this Court must be slow to hold a State law invalid; under the evidence here, such a holding is not "imperatively necessary;" in enacting the particular law here involved, the State legislature had "a very wide range of discretionary power;" the classification adopted by the legislature "is a reasonable one and such as essential differences suggest;" such classification does not indicate any "clear and hostile discrimination between particular persons and [fol. 69] classes;" it cannot be said that the classification adopted was not "suggested by * * * characteristics which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, and impracticable to apply thereto the ordinary methods of taxation." It is not clearly shown that Chapter 226, supra, is in violation of either the State or the Federal constitution. The Act, therefore, should be held valid. The justice or injustice of the tax, and the question of where it should ultimately fall, and by whom ultimately it should be paid, are not for determination here and no comment is made thereon.

11. In a sense it may be said that the two taxes herein referred to are together imposed upon the mining operation as a whole, as the same affects any particular description of land. Undoubtedly, the Legislature of 1923, had something like this in mind. This would not require that the two taxes should be of the same kind. The character of the tax depends upon the legislative intent as expressed in the law. Under either Act, the tax might have been laid as an occupation tax, or as an income tax, or as a tax on the land, as might at the same time be applicable and valid and best give effect to the legislative will. Under the Act of 1921, the convenient and practicable form to employ was that of an occupation tax. Taken literally, the Act of 1923, provides for a tax on royalties. Certain non-

residents of the State of Minnesota, urge that as to them, the situs of the royalty is never within the jurisdiction of that State, and, therefore, that the royalty cannot be taxed therein. Shaffer vs. Carter, 252 U. S. 37, 55, is opposed to this view and as against the objection referred to, if the Act were construed as providing for a direct tax on royalties, it would stand. Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax.

Pollock vs. Farmers' Loan & Trust Co. 157 U. S. 429, 581.

12. The question of what royalty receipts shall be included in the computation of the tax for the year 1923, is not decided. It is assumed that in the administration of the law, the Act in question will be so construed as not to offend against any constitutional provision.

From the foregoing, if correct, it follows that the relief prayed for should be denied.

Let decree in the above entitled suit be prepared in accordance herewith, and let such decree provide that the temporary restraining order in said suit heretofore issued be and remain in full force and effect for the period of sixty days after the entry of such decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge United States District Court.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE

This cause came duly on to be heard, and was argued by counsel, and, upon consideration thereof, it is ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed, with costs to the defendants to be taxed.

It is further ordered that the temporary restraining order heretofore issued in this suit be and remain in full force and effect for the period of sixty days after the entry of this decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge United States District Court.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 9, 1925

[fol. 72] The above named plaintiffs, conceiving themselves aggrieved by the decree made and entered on the 16th day of January, 1925, in the above entitled cause, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that the temporary restraining order heretofore issued in this cause be and remain in full force and effect pending the appeal herein and until the final determination of this cause.

Mitchell, Dohert, Rumble, Bunn & Butler, 1006 Merchants National Bank Bldg., Saint Paul, Minnesota; Beaumont, Smith & Harris, 1122 Ford Building, Detroit, Michigan; Weadock & Weadock, 301 Bearinger Building, Saginaw, Michigan, Solicitors for Plaintiffs and Appellants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The foregoing petition is granted and plaintiffs' appeal allowed, and the plaintiffs having given the undertaking as required by law and approved by this Court.

It is ordered, that the temporary restraining order heretofore issued in this suit be and remain in full force and effect pending said appeal and until the final determination of this cause.

Dated March 9, 1925.

Wm. A. Cant, Judge of U. S. District Court.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 9, 1925

Plaintiffs, in connection with their petition for appeal in the above entitled cause, present the following assignments of error upon which they will rely in said appeal.

The Court erred:

1. In dismissing plaintiffs' bill of complaint and entering a decree for the defendants.

2. In holding that Chapter 226 of the Laws of Minnesota, 1923, does not violate Section 1 of Article 9 of the Constitution of the [fol. 74] State of Minnesota, which required that taxes shall be uniform upon the same class of subjects.

3. In holding that the tax imposed by said act is not obnoxious to the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the State the equal protection of the laws.

4. In holding that such tax is not in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

5. In holding that the tax so imposed does not violate Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts.

6. In holding that iron lands under lease may properly be segregated in a special class and a special and additional tax levied thereon, or on the income or receipts therefrom.

7. In holding that the fact that iron lands are being depleted of their natural wealth furnished any proper basis for classification, under which they may be subjected to special and double taxation.

8. In holding that, for the purpose of special taxation, it is proper to classify lands according to the form of contract by which they are disposed of or enjoyed.

9. In failing to hold that the tax so imposed, if a tax upon royalty as such, distinct and separate from the land, is void, because it attempts to tax property beyond the jurisdiction of the state.

[fol. 75] 10. In failing to hold that plaintiffs were entitled to the relief prayed for in their bill of complaint, and to enter a decree permanently enjoining the defendants from enforcing the provisions of the said act.

11. In holding that unless the act in question is invalid as against the uniformity clause of the state constitution with reference to taxation or as against the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, it must stand.

12. In holding in effect that a classification is valid if based on the incidents of the ownership of the property taxed rather than on its characteristics.

13. In holding in effect that an otherwise invalid and unconstitutional act can be held to be valid because of the existence of a prior act (Chapter 223 of Laws of 1921).

14. In holding that the fact that other mining properties not in process of being mined or depleted are not taxed under the act, is not important.

15. In holding that the fact that other wasting properties such as stone quarries and gravel pits, or certain lumber areas, are not included in the act does not invalidate the classification.

16. In holding that a heavier tax may be levied on ore lands which are being depleted (or on the income or receipts therefrom) than on other ore lands (or on the income or receipts therefrom), or than on other non-ore lands that are being depleted.

17. In holding that under either the 1921 or the 1923 Acts the tax might have been levied as an occupation tax or income tax, or a tax on the land, as might best give effect to the legislative will.

[fol. 76] 18. In failing to hold that if it is a tax against the person, or an excise or privilege tax, or a tax on income or gross receipts, it is void as to non-residents.

Mitchell, Doherty, Rumble, Bunn & Butler, Solicitors for Plaintiffs. Business Address: Merchants National Bank Bldg., Saint Paul, Minnesota. Beaumont, Smith & Harris, Weadock & Weadock, M. J. Cavanaugh, of Counsel for Plaintiffs.

[fols. 77-79] CITATION—In usual form, showing service on Clifford L. Hilton; filed March 28, 1925; omitted in printing

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the Clerk of this Court shall incorporate in the transcript of the record on the appeal in the above [fol. 81] entitled cause to the Supreme Court of the United States the following:

1. Bill of complaint.
2. The answer.
3. The motion for restraining order, stipulation for hearing thereon, and the restraining order.
4. Agreed statement of facts, and paragraphs numbered 14 to 22, inclusive, of the agreed statement of facts in the case of Royal Mineral Association, a corporation, plaintiff, v. Samuel Lord et al., defendants, Equity case No. 99, now also on appeal to the Supreme Court of the United States, which case for convenience was heard at

the same time and with the above entitled cause, and which paragraphs were incorporated by reference in the agreed statement of facts in this cause.

5. Agreed transcript of evidence.
6. Stipulation for hearing and continuing restraining order.
7. Opinion of court and order for decree.
8. Decree.
9. Petition for appeal and order allowing same and continuing restraining order.
10. Assignments of error.
11. Citation.
12. Stipulation for transcript of record.

Dated this 21st day of March, 1925.

Beaumont, Smith & Harris, Weadock & Weadock, Mitchell, Doherty, Rumble, Bunn & Butler, Solicitors for Plaintiffs.
Clifford L. Hilton, G. A. Youngquist, Patrick J. Ryan, Solicitors for Defendants.

[fol. 82] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Joel M. Dickey, Clerk of the above named Court, do hereby certify and return to the Honorable, the United States Supreme Court, that the foregoing, consisting of 82 pages, numbered consecutively from 1 to 82 inclusive, is a true and complete transcript of all the records, process, pleadings, orders and final decree and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said Court and in accordance with a præcipe for such transcript, a copy of which in included within said paging; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid and affixed the seal of said Court at Duluth in the District of Minnesota, this 2nd day of April A. D. 1925.

Joel M. Dickey, Clerk, by E. Catherine Neff, Deputy. (Seal U. S. Dist. Court, Dist. of Minnesota, Fifth Division.)

Endorsed on cover: File No. 31,025. Minnesota D. C. U. S. Term No. 355. George L. Burrows, Jr., Alice B. Beaumont, Elizabeth B. Huntington, et al., etc., et al., appellants, vs. Samuel Lord, James G. Armson, Odin Halden, etc., et al. Filed April 13th, 1925. File No. 31,025.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 471

HELEN P. BARDWELL, HARRIOT P. AYER, AND ALICE P. FORSMAN, APPELLANTS,

vs.

SARGENT LAND COMPANY, SAMUEL LORD, JAMES G. ARMSON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

FILED MAY 14, 1926

(31,185)

(31,185)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 471

HELEN P. BARDWELL, HARRIOT P. AYER, AND ALICE P. FORSMAN, APPELLANTS,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

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[fol. 1] [Caption omitted]

[fol. 2] **IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION**

In Equity

HELEN P. BARDWELL, HARRIOT P. AYER, and ALICE P. FORSMAN, Plaintiffs,

vs.

SARGENT LAND COMPANY, a Corporation; SAMUEL LORD, JAMES G. Armson, and Odin Halden, as Constituting the Minnesota Tax Commission; Clifford L. Hilton, as Attorney General of Minnesota; Raymond P. Chase, as State Auditor of Minnesota, and Henry Rines, as State Treasurer of Minnesota, Defendants

BILL OF COMPLAINT

Helen P. Bardwell, Harriot P. Ayer and Alice P. Forsman bring this, their Bill of Complaint, against Sargent Land Company, a corporation; and allege:

(1) That plaintiff, Helen P. Bardwell, is and for many years last past has been a resident and citizen of the State of Massachusetts and that each of the plaintiffs, Harriot P. Ayer and Alice P. Forsman, for many years last past has been and now is a resident and citizen of the State of California.

(2) That said defendant, Sargent Land Company, has been for many years last past and now is a corporation duly organized and existing under the laws of the State of Minnesota, having its principal office and place of business in the City of Minneapolis, Hennepin County, Minnesota, in the Fourth District of said State; that said defendant has a capital stock of 2,160 shares of the par value of Fifty Dollars each and that each of the plaintiffs now is and for a long time last past has been the owner and holder of a large number of said shares.

(3) That defendants, Samuel Lord, James G. Armson and Odin Halden are the duly appointed, qualified and acting members of, and [fol. 3] constitute, the Minnesota Tax Commission of said State, a department of the State government thereof under and by virtue of the statutes of said State; that said Samuel Lord is a resident of Dodge County, said James G. Armson is a resident of Washington County, and said Odin Halden is a resident of St. Louis County, all in said State; that said defendant, Clifford L. Hilton, is the duly elected qualified, and acting Attorney General of said State and is a resident of Ramsey County therein; that defendant, Raymond P. Chase, is the duly elected, qualified and acting State Auditor of said

State and a resident of Anoka County therein; and that defendant, Henry Rines, is the duly elected, qualified and acting State Treasurer of said State and a resident of Kanabec County in said State, and that all said defendants are citizens of the State of Minnesota.

(4) That defendant, Sargent Land Company, was organized for the primary purposes of receiving and uniting in one ownership the title to certain lands in the State of Minnesota until then held by its numerous stockholders in individual ownership in undivided fractional shares (the shares of some of such stockholders being extremely small), and of liquidating and converting the same into money to enable the distribution thereof to said various owners in proportion to their respective ownership interests in said lands. That, after the organization of said corporation, the title to said lands was duly conveyed to said corporation by the various owners thereof and that by virtue thereof said Sargent Land Company has been for many years last past and now is the sole owner and holder in fee of numerous tracts and parcels of land situated in the State of Minnesota, of large value; that at the time of the conveyance of said lands to said corporation, the chief value therein consisted in deposits of iron ore on some of said lands and that no substantial increase of value therein has since developed or now exists. That the articles of incorporation of said Sargent Land Company have for many years last past stated and do now state and provide that the general purposes of said corporation shall be "to unite in one ownership the undivided fractional interests of its various stockholders in lands, tenements and hereditaments and to own such property, and for the convenience of its stockholders, to receive and distribute among them the proceeds of any disposition of such property, at such times, in such amounts and in such manner as the board of directors may determine." That said corporation has no purpose or purposes whatsoever other than those above specified and limited in its said articles of incorporation, and that it has at all times held and now holds all said lands for such purposes, and for no other purposes or purposes whatsoever.

(5) That under its said articles of incorporation, said Sargent Land Company has not been and is not authorized to open, develop or operate mines upon its said lands, or any of them, or elsewhere, and that it has never opened, developed or operated a mine or mines, and that it never has been and is not now engaged in the business of mining of any kind or in any business or occupation whatsoever except as herein above set forth; and that its only means of liquidating such of its assets as consist of mineral lands and of effecting the purposes of its incorporation were at all said times and now are by leasing its [fol. 4] said mineral lands to be mined and operated by its said lessees, or by selling the iron ore contained therein to a purchaser or purchasers desirous of buying and removing the same, and, in the case of lands on which there are no mineral deposits, of selling the same as purchasers may be found therefor.

(6) That said corporation was at all times during the year 1923 and now is the owner in fee of several tracts of land upon which valuable deposits of iron ore exist as aforesaid the entire substantial value of which tracts consists in said iron ore. That some of said tracts were not at any time during the year 1923, and are not now, leased or mined nor has any ore been sold therefrom, and that no royalties were received for such ore as may exist therein, nor have any moneys been received for sales of ore therein, during said year 1923 or at any time. That four of said tracts on which deposits of iron exist were, however, under lease to certain lessees during portions of said year 1923 under and by virtue of four separate mining leases (of too great length for all of them to be conveniently embraced in this bill of complaint), but so far as here material, all said leases were and are in the form, or substantially in the form, of Exhibit "1" hereto attached and hereby made a part of this complaint; said Exhibit "1" being a copy of a lease executed upon one of said tracts by the predecessors or grantors of said Sargent Land Company, and which said lease and said lands therein described are now and were at all times in said year 1923 the property of said company. Said four mining leases, or any of them, will be produced by the plaintiffs upon the trial of this suit if such production be deemed desirable by the Court. That said corporation, during said year 1923, derived from the royalties payable under said leases, either by way of royalties paid to it in advance of the mining and shipment of ore from said lands (in accordance with the requirements of said mining leases) or by way of royalties paid to it by its lessees for ore actually mined and shipped from said leased lands, considerable amounts of money and will continue to receive considerable amounts of money from and on account of such royalty payments while said mining leases or any of them remain in force.

(7) That said Sargent Land Company has sold to a certain vendee the iron ore in, under and upon one of its said tracts of mineral land referred to in paragraph 6 hereof, under and by virtue of a certain written sale-agreement, a copy of which, marked Exhibit "2", is hereto attached and made a part hereof. That said corporation derived from the payments due and payable under said agreement, during the year 1923, as therein set forth certain moneys and will continue to receive certain moneys from and on account of such payments until the terms of said agreement are fully performed by said vendee; that such payments made to said corporation under the terms of said sale agreement are not and were not at any time royalties received for permission to explore, mine, take out and remove ore from said lands, but were and are the agreed purchase price, or installments thereof, paid by the vendee in said sale agreement for the ore therein described.

(8) That the allegations of paragraphs numbered 6 and 7 of this complaint are also true as respects a very large number of owners of [fol. 5] lands, and of interests in lands, containing deposits of iron ore in the State of Minnesota, other than said Sargent Land Company; and that each of said other owners will be subject to, and

affected by, the provisions of Chapter 226 of the Laws of Minnesota for 1923 hereinafter referred to, although in differing degrees, in substantially the same manner as said Sargent Land Company will be affected, as alleged in this complaint. That certain fee owners of mineral bearing lands in Minnesota, other than the Sargent Land Company operate their own properties and mine and remove the ore therefrom without paying money in the nature of royalties for the permission to explore, mine, take out and remove ore from the land.

(9) That the Legislature of the State of Minnesota, at its session of 1923, enacted Chapter 226 of the Laws of Minnesota, for said year 1923, entitled: "Act Providing for the Levy and Collection of a Tax on Royalties Received by the Owner of any Right, Title or Interest in Land Situated in This State for Permission to Explore, Mine, Take Out and Remove Ore from the Same," which Act was approved by the Governor of said State April 11th, 1923, and by its terms was to take effect and be in force from and after its passage; a copy of which Act is set out in Exhibit "3" hereto attached and made a part hereof.

(10) That said royalty tax proposed to be levied and collected under and pursuant to the provisions of said act in paragraph 9 described upon the royalties or upon the payments for ores sold, received by said Sargent Land Company in said year 1923 and which will be payable by and collected from said Company, if the provisions of said Act be enforced as threatened, will be large, and that every dollar of any such tax paid by said Sargent Land Company under the requirements of said Act will unlawfully diminish the distributive shares to which these plaintiffs, and every other shareholder of said company, are entitled in the assets of said company and will unlawfully interfere with and prevent the due carrying out of the purposes for which said Company was created, to-wit: the liquidation of its assets and the distribution of the proceeds thereof to said shareholders.

(11) This is a suit brought in equity to restrain the defendants and each of them from acting under and in pursuance of the provisions of said Act or any of them and from in any way carrying out or enforcing, or seeking to carry out or enforce, the provisions thereof or any of them, upon the ground that the provisions of said Act and each of them are in violation of the Constitution of the United States as well as of the Constitution of the State of Minnesota and are inoperative and void, in that they violate Section 1 of Article 9 of the Constitution of Minnesota providing that taxes shall be uniform upon the same class of subjects; and in that they further violate Sections 33 and 34 of Article 4 of the Constitution of the State of Minnesota prohibiting special legislation and requiring all laws to be uniform in their operation throughout the State; and in that they further violate Section 7 of Article 1 of the Constitution of the State of Minnesota providing that no person shall be deprived of life, liberty or property without due process of law; and in that they further violate the provisions of Section 13 of Article 1 of the Con-[fol. 6] stitution of the State of Minnesota providing that private

property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured; and in that they further violate the Fourth Amendment to the Constitution of the United States, providing that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and in that they further violate the fifth amendment to the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation; and in that they further violate the provisions of the fourteenth amendment to the Constitution of the United States providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States and providing that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That any and all acts done, threatened or attempted to be done, under the provisions of said Act by said defendants or any of them will be in violation of the said provisions of the Constitutions of the State of Minnesota and of the United States. That this suit is brought as respects also the moneys received on account of sale of ore in said sale agreement in paragraph 7 hereinabove set forth upon the further ground that any and all payments received under or on account of said sale agreement are not royalties for permission to explore, mine, take out and remove ore from the lands therein described and are not and were not at any time within or under the terms of said Act and not subject to the tax therein provided for.

(12) That the matter in dispute in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, in that, if the provisions of said Act be carried out and enforced, said Sargent Land Company will be required to pay in taxes on account of royalties paid under said mining leases, as well as on account of payments for ore sold, received by said Company in the year 1923, an amount in excess of the sum of Three Thousand Dollars, and will be required in each and every year thereafter, until the deposits of iron ore upon its said tracts of land are exhausted (which exhaustion, these plaintiffs are informed and believe, will not be accomplished for more than twenty years yet to come), to pay in taxes on account of such royalties and payments for ores sold, and each of them, an amount also largely in excess of the sum of Three Thousand Dollars; and that the proportion of said taxes which will be deducted from the distribution to which each of these plaintiffs will be entitled on account of their said interests as shareholders in said corporation, and its said properties, will be in excess of said sum of Three Thousand Dollars.

(13) That all real property in the State of Minnesota, not exempt from taxation, has been at all times and now is subject to an annual ad valorem tax; that all such real property has been for many years

last past and now is classified for taxation in acordance with its character and with the different rates of assessment fixed by law as applicable to the various classes of such real property; that lands containing deposits of iron ore have been for many years last past and now are assessed by law at the highest rate of assessment, to-wit: at fifty per cent of their full and true value; that a copy of the [fol. 7] statutes of Minnesota now and for several years last past in force relative to the definition of real and personal property and classification for purposes of assessment is hereby attached and set out in Exhibit "4" and hereby made a part hereof. That under and by virtue of said Statutes the full and true values of all said tracts of land belonging to said Sargent Land Company containing deposits of iron ore as mentioned in paragraphs 6 and 7 hereof, and more especially the full and true value of the ore therein contained, have been for many years last past and now are determined for purposes of taxation by said Minnesota State Tax Commission, as have been also the full and true values of all other deposits of iron ore in the State of Minnesota. That said Tax Commission has had at all said times and now has full and complete machinery for the skilful, painstaking and scientific determination of such full and true values, and that its determinations are carefully and accurately made and have been, are, and will be in the future, as these plaintiffs are informed and believe, as nearly competent and correct as the same can be made; that an annual ad valorem tax at the same rate of taxation as fixed by law for all property in the taxing district in which said tracts of land are situated has been levied against all the lands of said Sargent Land Company for many years last past upon such assessed valuations determined as aforesaid and has been so levied and assessed for said year 1923 and that such tax is now due and payable and will be paid in due course.

(14) That all personal property in the State of Minnesota, not exempt from taxation, is also subject to an annual ad valorem tax according to the classification of such property as set forth in said Exhibit "4," and that "Moneys and Credits" so-called as defined by Statute, from whatsoever source derived, are subject to a fixed annual tax at the rate of three mills upon the dollar, as set forth in said Exhibit "4"; that all of the personal property of said Sargent Land Company, and all moneys and credits belonging to said company have been duly returned by said company in each year for many years last past for purpose of taxation as required by law, and were so returned for taxation by said company in the year 1923, and will be so returned in each year hereafter so long as said company has money or credits and personal property subject to said annual tax; that the tax levied upon such moneys and credits and personal property of said company returned as aforesaid for such year 1923, became due and payable on the first Monday of January, 1924, and will be paid by said company in due course; that included in said personal property and moneys and credits belonging to said company and returned and assessed for taxation as aforesaid in said year 1923 are certain moneys received by said company to a considerable

amount from sources other than said mineral leases and said sale agreement, to-wit: sales of lots, interest on bank deposits and other sources of revenue; that all moneys on hand or received by said Company during said year 1923, from whatever source derived, were mingled and deposited in a single bank of deposit; that all such moneys so received from different sources have never been, at any of said times, and do not now bear any distinguishing earmarks or [fol. 8] characteristics, but that the same have been at all said times and are now, except so far as the same have been distributed to shareholders, mingled together without distinction as to their source or origin.

(15) That all moneys (including royalty payments derived under mining leases and payments received as instalments on sales of ore) constitute in the hands of a taxpayer in the State of Minnesota a single class only of taxable property; that no classification of moneys exists under the statutes of the State of Minnesota either with reference to the source from which the same are derived or otherwise, but all moneys received by the taxpayer in said State are for the purposes of taxation included in the single statutory class known as "moneys and credits," and the Legislature of said State has no power to classify for taxation moneys owned by a taxpayer based on the source from which said moneys are derived; that the tax which said Act purports to authorize and require to be laid upon royalties, if intended to be a tax upon the moneys received by any taxpayer as royalty "for permission to explore, mine, take out and remove ore from land" in the State of Minnesota, will if levied be unlawful and unjust as double taxation upon such royalty moneys and unlawful and unjust as imposing a tax upon moneys representing such royalties alone and in violation of the provisions of the Constitution of the United States and of the Constitution of the State of Minnesota more particularly hereinabove in paragraph (11) set forth.

(16) That, as hereinbefore alleged, said mineral-bearing tracts of land belonging to said Sargent Land Company have a large market value consisting almost entirely in the deposits of iron ore, in, under or upon said tracts, and the moneys received as royalties for permission to explore, mine, take out and remove ore from said lands, represent a conversion into money of, and a return to, said Sargent Land Company of the capital assets of such company represented by said lands, and, as such, are in the same class as other similar capital of the taxpayer, and cannot lawfully be taxed otherwise than as other capital assets are taxed; that, as a matter of fact, all of said tracts of land, and all of the iron ore in place, in, under or upon the same, are subjected to the annual ad valorem tax imposed by the State of Minnesota upon real property, and the valuation of all of said tracts of land for purposes of taxation is based chiefly upon the value of the iron ore in place upon said lands; that no provision is made in said Chapter 22[illegible] of the Laws of 1923, for deduction from the royalties proposed to be taxed under the provisions of said Act of any portion thereof as constituting a conversion and return to a taxpayer of capital assets, but the entire amount of said royalties

is required by said Chapter 226 to be taxed as receipts of the taxpayer, as income or otherwise, without recognition of the fact that the same are merely a conversion of capital assets and not an increase of property of the taxpayer; that the tax sought and intended by said Chapter 226 to be imposed upon such royalties is double taxation and unlawful and unjust, and in violation of the Constitutions of the United States and of the State of Minnesota hereinbefore specified in paragraph (11) of this complaint.

[fol. 9] (17) That if any part of the royalties received by said Sargent Land Company, under its said mining leases or its said sale-agreement, represent income to said Company, and not a mere conversion and return to said Company of its capital assets, such part of said royalty receipts is not subject to taxation under the constitution and laws of the State of Minnesota, in that the legislature of said State has never enacted a law imposing any tax upon incomes as such, and has no power under the said Constitution of the State of Minnesota to levy, assess or collect taxes upon incomes; that if the tax sought to be imposed by said Chapter 226 is intended to be a tax on income and if any part of royalties received by any taxpayer for permission to explore, mine, take out and remove, ore from land in the State of Minnesota, constitutes income, the same cannot lawfully be taxed as such in that the enactment of said Act was and is beyond the constitutional power of the legislature of the State of Minnesota, and the same was and is void, as being in violation of the provisions of the Constitutions of the State of Minnesota and of the United States specified in paragraph (11) of this complaint.

(18) That if any part of the royalties received by said Sargent Land Company under its said mining leases constitutes rents for the occupation and use, by their respective lessees, of said mineral bearing lands which are under lease, such rents in the hands of said company (and moneys similarly derived by any other taxpayer in the State of Minnesota) cannot lawfully be distinguished from the rents derived from any other description of leased property; that such royalties (if and in so far as they constitute rents), and all other moneys received as rent from other sources, immediately and ipso facto lose their identity as rents, and become, for purposes of taxation, "moneys" belonging to the taxpayer receiving the same, and are taxable only as such; that the tax proposed and intended by said Chapter 226 to be laid upon the royalties therein referred to if intended to be a tax on rents as income, will be, if and in so far as such royalties constitute rents, double taxation upon such royalty receipts, and will be unlawful and unjust and in violation of the provisions of the constitutions of the United States and of the State of Minnesota, as averred in paragraph (11) of this complaint.

(19) That if the tax sought to be imposed by said Chapter 226, is intended to be an excise tax upon the exercise of the right to grant "permission to explore, mine, take out and remove ore from land in this State," it is unlawful and void and is in violation of the provisions of the Constitutions of the State of Minnesota and the United

States, and each of them, specified in paragraph (11) of this Complaint.

(20) That if the tax sought to be imposed by said Chapter 226, is intended to be a tax on the lands in Minnesota covered by mining leases or by any other agreement authorizing the exploration, mining, taking out or removing ore therefrom, it is a tax in addition to the ad valorem tax hereinbefore mentioned and is double taxation and is not uniform upon the same class of subjects, in that it is laid only [fol. 10] upon those lands containing ore from which royalties may be derived, and constitutes an arbitrary and unreasonable method of levying a tax thereon, without any proper or equitable relation to the actual value of the lands either as determined by the said Minnesota Tax Commission, as hereinbefore alleged, or otherwise, and is unlawful and void and in violation of the provisions of the Constitutions of the State of Minnesota and the United States, and each of them, specified in paragraph (11) of this Complaint.

(21) That on the 2nd day of January, 1924, at a duly convened meeting of the Board of Directors of said Sargent Land Company, at which a quorum of the directors of said Company was present, it was moved that the directors, in behalf of the corporation, refuse to observe and comply with the provisions of section 3 of said Chapter 226 of the Laws of 1923, in respect of the making and filing, with the Minnesota Tax Commission, of the verified report therein required to be made, and refuse to pay any tax that may be fixed as due and payable from said corporation by the Tax Commission of the State of Minnesota under the provisions of Section 6 of said Chapter 226, upon the ground that said Chapter 226 was and is unconstitutional and void, and in violation of the provisions of the Constitutions of the State of Minnesota and of the United States specified in paragraph (11) of this complaint; that said motion was voted down by said Board of Directors, and thereupon said Board of Directors, by the vote of a majority of the full number of the Board adopted a resolution authorizing and instructing the proper officers of said corporation to comply with all provisions of said Chapter 226 required to be observed and complied with by said corporation; that said corporation and its officers purpose and threaten to make the report required by section 3 of said Chapter 226, and to pay any tax imposed and fixed under the provisions of said Chapter 226 upon all royalties and upon all payments under or by virtue of said ore sale agreement, received by said corporation during the year ended December 31, 1923, and that, unless restrained by this Court, said corporation, acting through its said officers, will make and file such report, and will thereafter pay the tax upon such royalties and upon such payments under said sale agreement, received by the corporation during the said year, and that thereby the funds and assets of said corporation will be unlawfully depleted and the value of the shares of its capital stock will be decreased, and these plaintiffs and other owners of shares of capital stock of said corporation will be unlawfully deprived of their property.

(22) That the defendants Samuel Lord, James G. Arnson and Odin Halden, acting as the Minnesota Tax Commission, as required under Section 5 of said Chapter 226, threaten to and will on or before May 1, 1924, determine the amount of the tax including penalties thereon, if any, and levy the same upon all the royalties and moneys received by said Company in said year 1923 under and by virtue of said leases, and that they threaten to and will levy such tax as well upon all moneys received by said Company in said year 1923 under and by virtue of said ore sale agreement hereinabove set forth, upon the ground that said last named moneys are "royalties" within [fol. 11] the meaning of said Act, that they threaten to and will certify such tax and the amount thereof to the defendant Raymond P Chase, as State Auditor, who as required by Section 9 of said Chapter 226 threatens to and will make his draft upon said Company for the amount so certified and place the same in the hands of the defendant, Henry Rines, as State Treasurer, for collection. That defendant, Henry Rines, as State Treasurer, as required by Section 11 of said Chapter 226 threatens to and will attempt to collect said draft, and upon the refusal of said Company to pay the same, deliver the same to the defendant Clifford L. Hilton, as Attorney General. That said Clifford L. Hilton, as Attorney General, as required by Section 10 of said Chapter 226, threatens to and will bring action thereon against said Company for the amount of such draft, together with interest, penalties and costs. If judgment is obtained against said Company in said action, the same will, under the provisions of said Chapter 226, bear interest at the rate of 1 per cent per month, which said amount will be in the nature of and will in fact be a penalty upon said Company. That said persons defendant will severally so act wrongfully and unlawfully unless restrained therefrom by order of this court; that any such taxes so paid by said Corporation cannot be recovered back by said Corporation or any one and that these plaintiffs herein would suffer irremediable damages and injury thereby; and that plaintiffs have no plain, adequate or complete remedy at law.

Wherefore plaintiffs pray this Honorable Court for a judgment and decree against the defendants and each of them as follows:

1. That said defendant Sargent Land Company, its officers and agents and each of them be enjoined and restrained from making and filing with the Minnesota Tax Commission the verified report in respect of the royalties or moneys received by said Corporation during said year 1923 under or by virtue of said leases and/or said ore sale agreement, as required by Section 3 of said Chapter 226 of the Laws of 1923 of the State of Minnesota or otherwise; and from paying the tax or any part thereof that may be assessed again said Corporation under or by virtue of said Chapter 226 and from taking any procedure or steps whatsoever to observe and comply with said Act or any part thereof; and that an order restraining said defendant Sargent Land Company, its officers and agents and each of them from so acting be issued upon the filing of this complaint together with a temporary

injunction to like effect against them and each of them during the pendency of this action.

2. That all other defendants, other than said Sargent Land Company, be enjoined and restrained from levying, collecting or enforcing by suit or otherwise, any tax or any penalties upon such tax under or by virtue of the provisions of said Chapter 226 of the Laws of 1923 of the State of Minnesota, and from taking any action to interfere with or harass defendant, Sargent Land Company, or its officers, agents, servants or representatives, with reference to disclosing or furnishing information to the said defendants composing the Minnesota Tax Commission; and from taking any procedure whatsoever [fol. 12] as against defendant, Sargent Land Company, under or by virtue of the terms of said Act; and that an order restraining said defendants and each of them from so acting be issued upon the filing of this complaint together with a temporary injunction to like effect against them and each of them during the pendency of this action.

3. That the said statute, Chapter 226 of the Laws of 1923, of the State of Minnesota, be declared invalid and the defendants be perpetually enjoined from taking any action whatsoever under the provisions thereof, and that defendants, other than said Sargent Land Company, be perpetually enjoined from levying any tax against defendant, Sargent Land Company, or attempting to create, under or by virtue of said statute, any cloud upon the title to any of the property belonging to the defendant, Sargent Land Company, or in or to which it has any right, title or interest.

4. For such other and further relief as to the Court may seem just and proper.

John R. Vanderlip, Fred B. Snyder, Edward C. Gale, Solicitors for Plaintiffs, 800 Security Building, Minneapolis, Minnesota. Snyder, Gale & Richards, of Counsel.

Sworn to by Fred B. Snyder. Jurat omitted in printing.

[fol. 13] EXHIBIT NO. 1 TO BILL OF COMPLAINT

Mining Lease

This indenture, made this eighth day of January in the year 1902, by and between Frank H. Carleton, Carl K. Bennett and Charles M. Amsden, as Executors of the Last Will and Testament of George A. Pillsbury, deceased; Mary A. Pillsbury, John S. Pillsbury, Jr., and Charles S. Pillsbury and Nelle W. Pillsbury, his wife; Mahala F. Pillsbury, widow, Alfred F. Pillsbury, Sarah P. Gale and John P. Snyder (by his general guardian, Fred B. Snyder) only heirs at law of John S. Pillsbury, deceased, and Eleanor F. Pillsbury, wife said Alfred F. Pillsbury, and Edward C. Gale, husband of said Sarah P. Gale; Alfred F. Pillsbury, Fred B. Snyder,

Frank H. Carleton and Edward C. Gale, as administrators of the estate of John S. Pillsbury, deceased; Russell M. Bennett and Helen H. Bennett, his wife, all of Minneapolis, Minnesota; and John M. Longyear and Mary H. Longyear, his wife, of Marquette, Michigan, parties of the first part, and Edmund J. Longyear, of Hibbing, Minnesota, party of the second part, witnesseth:

That said parties of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter made, do hereby lease and demise unto said party of the second part all that certain parcel or tract of land situated in the county of St. Louis and state of Minnesota, particularly known and described as follows:

The northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of Section Five (5); and the southeast quarter of the northeast quarter (S. E. ¼ of N. E. ¼) of Section Six (6); all in Township fifty-seven (57) north, of Range twenty (20) west of the Fourth Principal Meridian.

Said lands are leased and demised unto said party of the second part for the purpose of boring, digging, exploring for, mining, taking out and removing all the merchantable iron ore that may be found therein or thereon, together with the right and privilege of erecting, making and maintaining on said lands all such buildings, machinery, excavations, openings, ditches, drains, railroads, tramways, wagon roads, and other improvements and fixtures as shall be necessary or convenient and useful for the purpose of such exploring for, or mining and removing, said iron ore which may be found on said premises together with the right, during the continuance of this lease, to cut and use all the timber, other than pine, which may be lying, standing, or being upon said lands, free and without charge, so far as may be necessary for fuel and the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tramways, supports, and shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad on or over which said ore may be transported. [fol. 14] To have and to hold said lands to said party of the second part, for the uses and purposes aforesaid, for and during the term of fifty (50) years, which shall commence upon the first day of January, 1902, and shall end upon the 31st day of December, 1951, or until this lease and demise shall be terminated in the manner hereinafter provided, said party of the second part truly and faithfully keeping, observing and performing each and every of the covenants, agreements and promises by and on the part of said party of the second part in this indenture made, and all the conditions hereinafter set forth and on the part of said party of the second part to be kept, observed and performed. And the said parties of the first part do hereby covenant to and with the said party of the second part, that they are, at the time of the ensealing and delivery of this indenture, lawfully seized in fee simple of the above leased and demised premises, that the same are free from all incumbrances,

and that they will said party of the second part, in the peaceable and quiet possession of the said leased and demised premises, and each and every part thereof, during the term aforesaid, or until the termination of the said lease and demise as herein provided, warrant and defend against the lawful claims and demands of all persons, provided the party of the second part shall keep, observe and perform each and every of the covenants, promises and agreements and conditions in this indenture on the part of said party of the second part made or to be kept, observed or performed.

But the foregoing lease and demise is made upon the express condition that the said party of the second part shall pay unto the said parties of the first part, their heirs, successors or assigns, as rent or royalty, at the times hereinafter stated, the moneys and sums hereinafter set forth or specified for each and every ton of iron ore removed from said premises during the term aforesaid of said lease and demise, to-wit: For every ton of iron ore taken out, mined or carried away from said lands and premises, the royalty to be paid to the parties of the first part shall be the sum of twenty-five (25) cents; and said party of the second part shall make and render the statements hereinafter specified to be by him made and rendered, at the times hereinafter stated therefor, and shall keep, observe and perform each and every of the covenants, promises and agreements hereinafter made, and on the part of the party of the second part to be kept, observed and performed.

Said second party expressly covenants and agrees to mine out clean as it goes all of the merchantable iron ore in the mines or ore deposits opened on said premises, allowing only for usual and reasonable waste; it being the intention of the parties hereto, and the meaning of this lease, that whereas certain of the iron ore underlying or upon the premises hereby leased is supposed to be richer in metallic iron and lower in phosphorus contents than other portions of the ore upon said premises, the said party of the second part shall not discriminate between any of said ores in his operations upon said premises, but shall remove the entire ore deposit which may be merchantable, as it goes, from the level or levels on which the mining operations are or shall be conducted to the surface of the ore deposit.

[fol. 15] The second party further agrees that he will make weekly reports, in triplicate, of any and all exploratory work conducted by him upon said leased premises, showing accurately, by map or plat, the location of all test-pits and drill-holes (which shall be numbered consecutively and may thereafter be referred to by number), and stating the progress of the work at each pit or drill-hole, the character of the formation encountered or passed through, and, if ore be found, said second party shall take samples thereof at least every ten (10) feet in depth of all ore bodies, shall make assays thereof, and report the same forthwith to the first party. All such reports shall be sent each week to Russell M. Bennett, at Minneapolis, Minnesota, to Alfred F. Pillsbury at Minneapolis, Minnesota, and to John M. Longyear, at Marquette, Michigan.

The second party further covenants and agrees that all the earth,

stones and other debris and waste excavated or removed in the process of exploring or mining, or in any other work, operations or improvements above authorized, shall be so deposited, and all the work and operations on said premises shall be so carried on and completed that the same shall not hinder or render dangerous or unreasonably inconvenient the future explorations of said premises for ores and minerals, or the continuation of the operations or work of mining thereon, and in such manner only as is usual or approved by experienced and skillful miners, having due reference to the future and permanent value of said premises as an iron mine.

That said party of the second part will cause all iron ores removed from said premises to be weighed by the railroad corporations that shall transport the same, and will furnish the parties of the first part each month with the certificate or statement of such corporation showing the weights of all such ores transported during the month preceding; that any certificate or statement in writing of any agent of any railroad corporation that said corporation has received for transportation any iron ores from said lands, at any time or times, and of the weights thereof, and any copies or transcripts from the books of any such corporation relating to the transportation or weights of such ores, as aforesaid, shall, as against said party of the second part, be prima facie evidence of the facts so stated or appearing in any suit at law or in equity, or in any controversy between said parties hereto, or their successors, representatives or assigns, in and before any court, reference or arbitration.

It is further covenanted and agreed that, in case any ores or minerals other than iron are discovered on the premises hereby demised, by the party of the second part, or in case of the discovery of any mixtures or combinations of ores or minerals which shall have a greater market value than iron ore, the second party is hereby expressly granted the right to mine and remove the same; and for all such other ores, minerals, mixtures or combinations taken out, mined or carried away by him, the party of the second part shall pay to the parties of the first part, as royalty, thirty-three and one third (33⅓) per cent of the marketable value or selling price thereof, at the market or markets therefor, less all transportation charges, which shall first be deducted from such market or selling price; and such royalty shall [fol. 16] be due and payable at the same times and in the same manner that royalty on iron ore shall be due and payable under the terms of this lease; and reports of the kind, quality and quantity of such other ores, minerals, mixtures or combinations, and of the market or selling price thereof at the place of market, and of all transportation charges thereon, shall be made at the same time and in the same manner provided in this lease in regard to reports upon iron ore, and such other ores, minerals, mixtures and combinations shall be subject, in like manner as iron ore, to all the terms and conditions of this lease.

Said party of the second part further covenants and agrees, between the first and twenty-fifth days of each and every month during the term aforesaid, or until the termination of this lease and demise, to make and render to said parties of the first part, their heirs,

executors, administrators or assigns, a true report, stating therein the quantity of all ores and minerals mined and shipped from said land since those reported in the last preceding statement.

And said party of the second part does hereby covenant, promise and agree to and with the said parties of the first part, their heirs, executors, administrators and assigns, that said party of the second part will well and truly pay unto said parties of the first part, their heirs, executors, administrators and assigns, the rent and royalty above specified, stated or set forth, at the times following, to-wit: On the twenty-fifth day of each month during the said term, or until this lease and demise shall have been terminated as herein provided, upon and for all such ores as shall have been removed from said premises during the calendar month next preceding that in which said rent or royalty becomes so due and payable.

And it is further covenanted and agreed by and between the parties hereto that the said lands are now owned in fee simple by the said parties of the first part in the following proportions, to-wit: The devisees of George A. Pillsbury, deceased, and their assigns, own an undivided one-sixth interest thereof; Mary A. Pillsbury, John S. Pillsbury, Jr., and Charles S. Pillsbury, own an undivided one-sixth interest thereof; the heirs of John S. Pillsbury own an undivided one-sixth interest thereof; Russell M. Bennett owns an undivided one-fourth interest thereof; and John M. Longyear owns an undivided one-fourth interest thereof.

The undivided one-sixth interest in said lands above referred to as belonging to the devisees of George A. Pillsbury, and their assigns, was owned by the said George A. Pillsbury at the time of his decease, and by his last will and testament he devised the same, one-third to his widow, Margaret S. Pillsbury, one-third to his son Charles A. Pillsbury, and one-third to the four children of his deceased son, Fred C. Pillsbury, in equal shares, with a provision that the shares of said children of Fred C. Pillsbury should be held by the executors of said George A. Pillsbury, deceased, in trust, until the said children should respectively arrive at the age of twenty-five years, and with a further provision that, in case any of said children of Fred C. Pillsbury did not arrive at the age of twenty-five years, their share should go to the survivors of said children.

The interest in said premises so devised to Charles A. Pillsbury [fol. 17] was, by decree of the Probate Court of Hennepin County, Minnesota, duly assigned and distributed to Mary A. Pillsbury, Charles S. Pillsbury and John S. Pillsbury, Jr., in equal shares.

By the said will of George A. Pillsbury, his executors were given power to lease any premises owned by said George A. Pillsbury, as will more fully appear by the record of a certified copy of said will in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 176 of Deeds beginning on page 188. No decree of distribution has yet been made in the estate of said George A. Pillsbury, and the said power to lease said premises by said executors is in full force and effect, and all rents rights, royalties and privileges herein reserved to the said estate of George A. Pillsbury, or the executors of said estate, belong to, are reserved for, and are to be paid to, the re-

spective devisees under the will of George A. Pillsbury, and their assigns, as hereinbefore set forth, and in the proportion as hereinbefore stated.

All payments of rent or royalty are to be made to the said parties in the proportions above stated, and in accordance with the notice herein provided for; and in case of any transfer of the interests of said owners, or any or either of them, payments of the shares so transferred, after notice to the party of the second part of such transfer, shall be made to the respective transferees.

It is further covenanted and agreed that said party of the second part, in making the reports to the parties of the first part, as herein provided, shall furnish to each of said owners a copy of such reports, at the time and in the manner herein provided.

The several payments required to be made by said party of the second part to said parties of the first part, shall be made at such bank or banks, in the city of Minneapolis or elsewhere, as the said parties of the first part, or their legal representatives or assigns, may, respectively from time to time in writing designate; and the bank or banks so designated shall be considered and treated as the agent or agents of the said parties of the first part, respectively, for the purpose of collecting and receipting for such payments.

For the rights, privileges and easements hereinabove granted, leased and demised, of entering upon said land and digging and exploring the same for iron ores, and in consideration thereof, said party of the second part does hereby further covenant, promise and agree to and with said first parties, that said party of the second part will pay to said parties of the first part, their heirs, executors, administrators and assigns, from and after the first day of July, 1902, the annual rental of eighteen thousand seven hundred and fifty ($18,750.00) dollars, in equal quarterly payments of four thousand six hundred and eighty-seven dollars and fifty cents ($4,687.50), payable in advance on or before the 25th day of July, October, January and April in each and every year during the said term, or until this lease shall have been terminated in the manner herein provided, whether any iron ores shall have been mined on or removed from said land, or whether any iron ore is known to, or does in fact, exist therein, or not; it being understood, however, that said quarterly rent of four thousand six hundred and eighty-seven dollars and fifty cents ($4,687.50) need not be paid in any quarter when royalties [fol. 18] paid in the preceding quarter by the party of the second part on iron ore actually mined and removed from said lands as herein stipulated, shall equal or exceed such quarterly rent of four thousand six hundred and eighty-seven dollars and fifty cents ($4,687.50); and when in any quarter year ending on the last day of September, December, March or June, the royalty paid by the party of the second part on iron ore mined and removed from said lands shall amount to less than the rental already paid for such quarter, the party of the second part shall be required to pay, at the time of the next quarterly payment of rent, only the difference between the royalty so paid and said quarterly rent of four thousand six hundred and eighty-seven dollars and fifty cents ($4,687.50); and all rent

paid by the party of the second part under this lease shall be credited to him and shall be applied to the reduction and payment of any excess over said quarterly sum of four thousand six hundred and eighty-seven dollars and fifty cents ($4,687.50) that may thereafter become due and payable under this lease as royalties on iron ore mined and removed by the party of the second part from said land, until said credit shall be exhausted; the intent of the parties hereto being that, in consideration of this lease, the second party shall pay to the first parties, their heirs, executors, administrators or assigns, as aforesaid, on or before the quarter days hereinbefore stated, in each quarter year during the continuance of this lease (reckoning from January 1st, 1902) the sum of not less than four thousand six hundred eighty-seven dollars and fifty cents ($4,687.50) by way of royalties for ores actually mined and removed during such quarter year, or (reckoning from July 1, 1902) shall pay said sum by way of rent for the use and occupation of said lands; but the second party shall be credited with all sums so paid by him which shall not be paid by way of royalty for ores actually mined and removed from said premises, and may apply such credits in reduction of any sums thereafter accruing for royalties in any subsequent quarter-year in excess of said minimum of four thousand six hundred and eighty-seven dolars and fifty cents ($4,687.50) payable in each of such quarter-years.

The party of the second part further covenants to pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands hereby demised and on the iron ore mined therefrom, and on all improvements and personal property thereon, while this lease shall remain in force, to pay the same as the same shall become due and payable, and to furnish the parties of the first part with duplicate tax receipts showing the payment of all such assessments or taxes: Provided, however, that the party of the second part shall always have the right to contest in the courts, or otherwise, the validity of any such tax or assessments in case he shall deem the same unlawful, unjust, unequal or excessive, or to take such other steps or proceedings as he may deem necessary to secure a cancellation, reduction, readjustment or equalization thereof before he shall be required to pay and discharge the same or any part thereof; but, provided further, that the party of the second part shall not permit or suffer said lands and property, or any part thereof to be sold at any time for any taxes or assessments.

That said party of the second part shall not commit, or suffer to [fol. 19] be made, and waste of said premises, nor sub-lease nor under-let the same, nor any part thereof (nor suffer any other person or persons to use or occupy the same, servants, employes, agents or contractors of said party of the second part excepted,) nor assign this lease, or the interest of the party of the second part therein, except with the consent of the parties of the first part, or those having their estate in the premises, first obtained in writing: Provided, however, that said party of the second part, or his assignee shall have the right to sublet portions of the surface of said land

ments of movable personal chattels, shall wholly cease and be terminated, and all right and title in such ores, timber, machinery, fixtures, improvements and movable personal chattels shall vest and be and remain in the parties of the first part, their heirs, executors, administrators and assigns, absolutely and forever.

It is hereby further covenanted, agreed and understood by and between the parties hereto that said party of the second part may terminate and surrender this lease and demise at any time, by giving the parties of the first part, or those having their estate in the premises, written notice of intention so to do sixty (60) days at least before such termination, and executing, acknowledging and delivering to said parties of the first part, their heirs, executors, administrators or assigns, a sufficient deed of release of all interest and rights of said party of the second part in said demised premises, and the improvements that may be thereon, duly signed, sealed and acknowledged by said party of the second part, and surrendering to the said parties of the first part, their heirs, executors, administrators and assigns, said premises and improvements, in good order and condition, damage by fire or other casualty which could not, by reasonable and ordinary care, have been prevented, excepted, together with all ores then thereon, and thereupon all liability of said party of the second part for any taxes subsequently assessed on said demised premises, or for rent thereof thereafter to accrue, or royalty on ores therefrom, except on account of ores removed, shall cease and be determined: Provided, however, that said party of the second part shall be liable to and shall pay said parties of the first part, their heirs, executors, administrators or assigns, for, or on account of, all ores removed from said premises and not theretofore paid for, as hereinbefore provided, the royalty thereon hereinabove set forth: to make and render all and the same reports, statements and certificates respecting the same hereinabove stipulated or agreed to be made during the continuance of said lease or demise, and shall pay for said premises, as aforesaid, rent or royalty for the year in which said termination shall be made, or the portion thereof which shall have expired at the time of said termination, at the rate of at least eighteen thousand seven hundred and fifty ($18,750.00) dollars per annum

It is hereby further covenanted, agreed and understood by and between the parties hereto that said parties of the first part, their heirs, executors, administrators and assigns, shall at all times have, possess and hold a lien upon all movable machinery, implements and personal chattels of said party of the second part that shall be on said premises, as security for the faithful discharge and performance of all agreements, covenants or conditions binding upon said party, and for the payment of the rents, royalties and taxes above mentioned, and for any moneys that may be due or owing under this indenture, and if default be made in the payment of such rent, royalty or taxes, or in the payment of any installment thereof, as [fol. 21] herein provided or in the performance and discharge of any of said agreements, covenants or conditions, the said parties of the

for stock-pile ground to persons, firms or corporations to whom he may sell or pledge his interest in iron ore mined on said premises, subject to the rights of the parties of the first part therein under this lease, for the purpose of storing thereon the ore so sold or pledged.

And said party of the second part further covenants and agrees that at the end of said term, or other termination of this lease or demise, he will peaceably surrender said premises to said parties of the first part, or those having their estate therein, with all the stopes, supports, shafts and other improvements and erections that may be made thereon (tools, implements and other movable personal chattels herefrom excepted), in good order and condition; that said parties of the first part, their heirs, executors, administrators and assigns, and their agents and servants, may, at all reasonable times, enter upon said premises, or any part thereof, peaceably, and view the same, and take all reasonable means to ascertain the condition thereof, and the kind, qualities and quantities of ores therein or removed therefrom, not thereby unreasonably or unnecessarily hindering said party of the second part; that if said party of the second part shall neglect to make any report or statement, or to furnish any statement, or to pay any rent, royalty, or taxes herein covenanted, promised and agreed by said party of the second part to be made, furnished or paid, at any time or times when the same should be made, furnished or paid, as herein agreed or stated, or if said party of the second part shall commit or suffer any breach of any covenant, promise or agreement of the party of the second part herein made, and such neglect to make or furnish such reports or statements, or to make such payment, or any breach of such covenants, promise or agreement shall continue for a period of fifteen (15) days after notice in writing given by the parties of the first part to the party of the second part, specifying the default, neglect and failure complained of, then said parties of the first part, or those having their estate in the premises, may, at any time thereafter, and while such default or neglect shall continue, without further notice or demand, and with or without any process of law or judgments, enter into and upon said premises, or any part thereof in the name of the whole, and take, have and hold possession thereof as of their former estate, together with all the ores, timber, machinery, fixtures, improvements and personal property that may be thereon, and the said party of the second part, and all persons holding or claiming under said party of the second part, eviet, expel, remove and exclude therefrom, forcibly if necessary, without being taken or deemed guilty of any manner of trespass, and without prejudice to any other action or remedy which said parties of the first part, their heirs, executors, administrators or assigns might otherwise have in law or equity, or otherwise, for any preceding breach of covenant, promise or agreement, or for rent or royalty, or for the recovery of possession of said premises, and thereupon all right of said party of the second part, and all persons holding or claiming under him in said premises, or any part thereof, or in any of said ores, timber, machinery, fixtures and other improve-

[fol. 20]

first part, their heirs, executors, administrators or assigns, are hereby authorized to enter upon the said premises above described, or into and upon any place where the said movable machinery and personal property shall be, and take the same into their possession, and sell and dispose of the same at private sale, without notice, or at public sale after giving ten days' notice of the time and place of such sale, in the manner then required by law for sheriff's sales, in their discretion, and at said sale to sell all the said movable machinery and other personal chattels above named in one lot, or in such lots as they may think fit, and out of the money arising from such sale retain the sum or sums due for damages or otherwise, together with the interest and all the costs and expenses of such sale or sales, rendering the surplus, if any, to the party of the second part, his successors or assigns.

It is further covenanted and agreed between the parties hereto that said parties of the first part, their heirs, executors, administrators and assigns, shall have and retain the title to all ore mined from said premises, whether said ore shall be upon the premises hereby leased or shall have been shipped away, until all royalty, rent and taxes then due under this lease shall be fully paid, and all the agreements, covenants and conditions hereof obligatory upon the second party shall be in all things observed and performed. And whenever any such rent, royalty or taxes shall be due or remain unpaid as aforesaid, or any breach or default shall have occurred, or shall exist, on the part of the second party, as to any of the terms, covenants or conditions of this lease, the right of the party of the second part to remove and take away ore from said premises shall thereupon be and remain suspended until such rent, royalty or taxes shall be paid, and until such terms, covenants or conditions have been faithfully performed or discharged by the second party; and whenever default shall be made by the second party in payment of royalty, rent or taxes as aforesaid, or in any agreement, covenant or condition of this lease, the parties of the first part, their heirs, executors, administrators and assigns shall have the right to revoke all power of further sales of ore, whether still remaining upon said premises or wherever the same may be situated, until the sums so due are paid and all the provisions of this lease are fully observed and performed by the second party; and upon notice given by the first parties, their heirs, executors, administrators or assigns, to the second party, in writing of such default, specifying the same particularly, all further removal and sales of ore then remaining on said premises shall cease until full payment shall be made of such rent, royalty or taxes in arrears, and full performance and discharge of all said agreements, covenants and conditions or until the same are secured to the satisfaction of the parties of the first part.

Upon the occurrence of any such default, said parties of the first part shall have the further right to take possession of any and all ores mined from or upon said premises, wherever the same may be, and to sell and dispose of the same, or sufficient thereof to raise the amount due and in arrears for rent, royalty and taxes as aforesaid, either at public or private sale, in the manner hereinbefore set forth

for the sale of personal property under the lien herein provided for. [fol. 22] It is hereby further covenanted and agreed by and between the parties hereto that all buildings, engines, boilers, tramways, hoisting apparatus and other erections, improvements, fixtures and machinery, that at the time of the commencement of said term shall be upon the premises herein demised, which belong to said party of the second part or which said party of the second part, or any person or party claiming, occupying, operating or controlling said premises by, through or under said party of the second part, shall construct or place thereon during said term, shall become and be a part of and belong to the land, freehold or realty, and said party of the second part, or any person claiming under him, shall have no right to destroy, take down, remove or injure the same, except for the purpose of replacing the same with other of equal or greater value, and equal or greater efficiency, as, in the judgment in the party of the second part, the exigencies of the mining business on said premises may require, without the consent thereto of said parties of the first part, or those having their estate in said premises, first obtained in writing; and upon the termination of the foregoing lease, either by expiration of said term, or by notice and deed of release given by said party of the second part, as hereinabove provided, and upon full performance of all the covenants, agreements and conditions in this indenture made and set forth, and on the part of said party of the second part to be kept, observed and performed, and upon full payment of all sums of money required by this lease to be paid by said party of the second part to said parties of the first part, said parties of the first part, or those having their estate in the premises, shall and will give and grant unto said party of the second part, by instrument in writing in due form, full and perfect right as against said parties of the first part, and all persons claiming under them, to remove from said premises within sixty (60) days after such termination of said lease, and to have, as and for his own property, all buildings and railroad tracks on the surface of said land, and all pumps, engines, boilers, hoisting apparatus and other machinery, tools and implements ordinarily removable as tenants' fixtures, and chattels personal, which shall have been placed on or in said premises by the party of the second part or his assigns.

It is further covenanted and agreed by the parties hereto that the second party shall not execute any mortgage trust-deed, lien or incumbrance on any ore mined or on said land, or allow any lien or incumbrance to attach thereto, which mortgage, trust-deed, lien or incumbrance shall not, by its terms, be expressly subject to the rights of the said parties of the first part herein, and to their paramount right to enforce the performance of all the agreements, covenants and conditions obligatory upon the second party, as well as the payment of the royalty rent or taxes to be paid by said party of the second part as provided in this lease, against the same; and, in case any mortgage, trust-deed, lien or incumbrance shall contrary to this covenant and agreement, be created by the party of the second part, or attach to any portion of said property, then and in such

case, said parties, of the first part shall have the right to immediately declare a forfeiture of this lease, and all rights of said party of the second part, or those claiming under him, hereunder, or in said [fol. 23] ores, and to enter upon said lands and take possession thereof and said party of the second part to remove therefrom, and also to take possession of all ores, machinery, improvements, fixtures, and all personal property of every kind, situated on said lands or elsewhere, belonging to said second party, and enforce the payment of said royalty, rent and taxes therefrom, as hereinbefore provided, and all other terms, covenants and conditions hereof to be performed by the party of the second part.

It is further covenanted and agreed that if the said party of the second part, or his assigns, shall become insolvent during the life of this lease, or while any ore mined from said premises remains unsold, said parties of the first part, their heirs, executors, administrators or assigns, shall have the right to demand payment of the royalty thereon, and all rent and royalty then accrued and remaining unpaid, whether due or not, and all taxes from the then current year, and all other sums which shall be, under the terms of this lease, a charge against such ore or that the same shall be secured to the satisfaction of said parties of the first part, their heirs, executors, administrators or assigns, in advance of and as a condition of the shipment of any ore mined upon or from said premises, or the removal of any buildings, engines, boilers, tramways, hoisting apparatus or other improvements, fixtures, machinery or personal chattels upon said demised premises.

And it is further covenanted and agreed that, in case the said party of the second part, or his assigns, shall give notice of his or their intention to surrender this lease, or upon the termination of this lease by lapse of time, or otherwise, or in case the ore in the mine or mines on the said premises shall become exhausted, said parties of the first part, their heirs, executors, administrators or assigns, shall have the right to demand the payment of all such accrued rent or royalty, and all royalty upon any ore mined from or upon said premises, wherever situated, and all taxes for the current year, and all other sums that shall be a charge against such ore under the terms of this lease, or that the same be satisfactorily secured in advance of and as a condition of any further shipments of such ore.

It is understood and agreed between the parties hereto that all notices required by this lease to be given by the parties of the first part to the party of the second part, or his assigns, may be served by delivering the same personally to said Edmund J. Longyear, or, at the option of said parties of the first part, by depositing the same in any postoffice in the United States, addressed to said party of the second part at the place where his last known principal business office is situated, postage prepaid.

It is further covenanted, agreed and understood between the parties hereto, that this lease, and the covenants, agreements and conditions herein contained, shall run with the land, and shall be binding upon the successors and assigns of the parties hereto, respectively.

It is further agreed that the word "ton" wherever used herein shall be construed to mean a long ton of two thousand, two hundred and forty (2240) pounds avoirdupois.

In witness whereof, this indenture has been executed by the parties hereto, the day and year first above written.

[fol. 24] EXHIBIT No. 2 TO BILL OF COMPLAINT

Sales Contract of Ore

Contract made this first day of January, 1918, by and between Sargent Land Company, a corporation of the State of Minnesota, having its principal office in the city of Minneapolis, vendor, and —— ——, a corporation of the State of New Jersey, having its office for the service of notices, etc., hereunder in the city of ——, vendee.

Article I.—Description of Property

The vendor is the owner in fee simple of the following described lands situated in the County of Itasca, State of Minnesota, to-wit:

The Southeast quarter (S. E. ¼) of Section twenty-three (23) and the West half of the Northeast quarter (W. ½ N. E. ¼) of Section twenty-six (26), all in Township fifty-seven (57) North, of Range twenty-two (22) West.

The title to said described lands was, on the 25th day of June, 1915, duly registered under the statute of the State of Minnesota concerning the registration of land and the title thereto, as evidenced by certificate of title Number 378, issued by the Registrar of Titles in and for the County of Itasca and State of Minnesota, subject only to the following encumbrances, to-wit:

1. An easement for right of way for railway purposes owned by the Great Northern Railway Company upon and over a strip of land one hundred (100) feet in width across the Northeast quarter of the Southeast quarter (N. E. ¼ S. E. ¼) of said Section twenty-three (23).

2. An easement for right of way for railway purposes owned by said Great Northern Railway Company over and upon a strip of land one hundred (100) feet in width over and across the Southwest quarter of the Northeast quarter (S. W. ¼ N. E. ¼) of said Section twenty-six (26).

3. Said easements for right of way are subject to the lien of a mortgage or trust deed thereon executed by said Great Northern Railway Company to the Bankers Trust Company recorded in the office of the Register of Deeds of Itasca County, Minnesota, in Book T of Mortgages at page 379, to which reference is hereby made.

Article II.—Vendor's Agreement to Sell.

In consideration of the sum of one dollar ($1.00) to it in hand paid by the vendee, the receipt of which is hereby acknowledged, and in further consideration of the payments by the vendee, in the installments herein specified, of the purchase price of said iron ore, and in consideration of the covenants, agreements and conditions herein expressed to be kept and performed by the vendee, the vendor [fol. 25] hereby sells to the vendee all of the iron ore in, under or upon the lands above described, on or before the expiration of fifty (50) years from the first day of January, 1918 (which period will expire December 31st, 1967), in accordance with the terms and conditions herein expressed; and the vendor further gives and grants to the vendee the right to enter upon said lands, and any part thereof, for the purpose of exploring for, mining and removing said iron ore, with full right and authority to construct all buildings and to lay and maintain pipes for the conveyance of water, and to make all excavations, openings, ditches, drains, railroads, wagon-roads and other improvements thereon suitable for mining, removing, washing, screening or otherwise separating from silica, sand, waste and other foreign substances said iron ore, and of cutting and using any timber upon said premises for any of the purposes aforesaid; and the vendee shall have the right to strip, or cave or sink shafts as may be necessary and adapted to the form of mining used by the vendee in mining and removing said ore, and the right to stockpile ore thereon, and to dump earth, rocks and waste of all kinds removed by it from said premises in exploring for, mining and removing said ore, without liability on the part of the vendee for the destruction of the surface of said lands or injury of the same, by reason of such stripping, caving or settling or by the deposit of such earth, rocks or waste; provided, however, that such earth, rocks or waste shall be deposited only upon such parcel or parcels of said land as shall be agreed upon, from time to time, by the parties hereto, as hereinafter stated.

The vendee shall likewise have the right, free and without charge, to erect on any unused portion of the surface of the said lands, and to use, occupy and enjoy, all necessary or convenient store-buildings, boarding and dwelling houses, but, in every case, any such use and occupation shall absolutely cease and determine upon the termination of this contract, and all such store buildings, boarding and dwellings houses may be removed from the said land within the time, and subject to the conditions provided in Article XVI hereof.

Article III.—Covenants of Title

The vendor hereby covenants with the vendee that it is lawfully seized in fee simple of all of said described lands and of all the minerals therein; that all of said lands and said iron ore are free from any encumbrances except those mentioned in Article I hereof, and that it will warrant and defend the title of said lands and minerals and will protect the vendee in the peaceable and quiet possession of

said lands until the termination of this contract, as herein provided, against any and all lawful claims and demands of any person or corporation whatsoever, save and except only such claims as may arise under said easements for right of way, or may be created by the vendee, or arise by virtue of its acts or omissions.

Article IV.—Vendee's Agreement to Buy and Pay Purchase Price

1. Purchase by Vendee.—The vendee expressly agrees, subject to the provisions of Article XV hereof, to buy, and does hereby buy, [fol. 26] all of the iron ore upon said described lands; and, except as hereinafter provided with reference to the application of advance instalments of purchase price, the vendee further agrees to pay to the vendor therefor, whether the amount thereof be less or more than the aggregate quantity hereinbefore named as ascertained and estimated to exist thereon, as follows:

(a) For each gross ton of iron ore mined from said lands which shall be shipped therefrom by the vendee and which shall have an average mineral content, when dried at two hundred twelve (212) degrees Fahrenheit, of forty-nine (49) per centum or more of metallic iron, the sum of seventy-five cents ($.75).

(b) For each gross ton of iron ore mined from said lands and shipped therefrom by the vendee which shall have an average mineral content, when dried at two hundred twelve (212) degrees Fahrenheit, of less than forty-nine (49) per centum of metallic iron, the sum of fifty cents ($.50).

The determination of the analysis for the purpose of computing the purchase prices of said ores, shall be as provided in Article VIII hereof.

2. Times of Payments. Payments to the vendor for ore so mined and shipped from any portion of said lands shall be due and payable on the last days of January, April, July and October in each year, which days are herein referred to as "quarter days." The payment on each quarter day shall be for the full amount of iron ore mined and shipped from said lands during the three calendar months immediately preceding the first day of the month in which said payment shall become due. No receipt for any such payment or any statement signed by the vendor based upon or induced by any erroneous or fraudulent report, statement or certificate shall bar, defeat or prejudice the right of the vendor to receive or recover the full amount of the purchase price of the ore sold hereunder.

3. Minimum Annual Instalments. The vendee further agrees, as one of the conditions of this contract to be strictly observed and performed by it, that it will mine and ship from said lands, while this contract remains in force, quantities of iron ore, as follows: During the calendar years 1918 and 1919, such a quantity of iron ore as will yield to the vendor in each of said years as a minimum instalment on account of the purchase price of the said ores, at least the sum of

seventy-five thousand dollars ($75,000.00); and during the calendar year 1920 and during each and every calendar year thereafter while this contract shall remain in force (except as specified in Paragraph 4 of this Article), such a quantity of iron ore as will yield to the vendor in each calendar year as a minimum instalment on account of the purchase price of said ore, at least the sum of one hundred fifty thousand ($150,000.00) dollars.

It is mutually understood and agreed that one of the considerations and conditions of this contract, without which it would not be made by the vendor, is, that such respective instalments of purchase price of said ore shall be paid by the vendee during each calendar year while this contract remains in force (except as provided in Paragraph [fol. 27] 4 of this Article, and subject to the provisions of Article XVI hereof) whether iron ore of that value be mined and shipped by the vendee in any such year or not. Payments of said instalments of purchase price shall be made quarter-yearly on the quarter days aforesaid, each payment to be in a sum equal to one-fourth (1/4) of the annual instalment above specified for such year.

4. Minimum Instalments Last Ten Years. It is mutually understood and agreed that during the last ten years of the term of this contract the annual minimum payment of purchase price to be made to the vendor by the vendee shall be such sum, at the prices per ton specified in Article IV, Section 1, hereof, as shall pay for one-tenth (1-10) of all of the merchantable iron ore, and of all iron ore which may be rendered then merchantable by treatment, estimated to be in place or in stockpile on the said lands at the beginning of said ten year period, less any of the same then already paid for by vendee; it being the intent and agreement of the parties hereto that all of the iron ore of the character aforesaid now in, under or upon said lands shall be mined and shipped, or shall be paid for to the vendor, by the vendee, at or before the 31st day of December, 1967. In case of disagreement as to the estimate, the same shall be settled by arbitration as provided in Article XVIII hereof, the estimate to be determined from such data as are then available, relative to the property. Nothing herein shall require the vendee to pay for more ore during the last ten (10) years than the mine contains, and in case it develops at any time that the ore body is less than estimated and that the minimum instalments then paid equal or exceed the purchase price of all of said ore, no further minimum annual payments shall be required, and the excess, if any, already paid shall be repaid by the vendor to the vendee.

5. Annual Instalments—How Paid and Applied.—The respective annual instalments of purchase price hereinbefore specified to be made by the vendee shall be made either by way of payments for iron ore actually mined and shipped by the vendee from said lands in the year in which such payment shall become due, or by payments in advance of the mining and shipping of iron ore from said lands, or by both such forms of payment. But it is mutually understood and agreed that any and all ore paid for by the vendee in advance of mining and shipping thereof, may, at any time while this contract

remains in force, be mined and shipped from said lands by the vendee without further payment therefor; and all advance payments made as aforesaid may be applied by the vendee in payment for ore thereafter mined and shipped in any year in excess of the amount required to produce the prescribed annual minimum payment for such year. If the minimum instalments of purchase price above provided for be promptly made, the vendee will not be required to mine and ship ore hereunder if, in its judgment, it seems wise for any period to suspend mining operations from time to time, or year to year.

Article V.—Designation of Mine

For the purpose of avoiding confusion, and of enabling exact accounts to be kept by the parties hereto, it is mutually agreed that the [fol. 28] said lands and the mineral deposits thereon shall always be known and designated as the "Sargent Mine" and shall be referred to by said name in all notices, reports, communications and bookkeeping.

Article VI.—Exploration

1. Monthly Reports.—The vendee shall make monthly reports to the vendor of any explorations made by the vendee upon the described lands. All such reports shall show accurately, by map or plat, the location and elevation with reference to sea-level datum of all drill holes, and other exploratory work, and shall show on blueprints all holes below the surface, which holes shall be numbered and may be thereafter referred to by number. The vendee shall also report the progress of the work at each hole, the character of the formation encountered or passed through, and, if ore be found, samples thereof shall be taken at least every five feet in depth of all ore bodies, and analysis thereof shall be made at the expense of the vendee, and reported to the vendor, as aforesaid.

2. Division of Samples.—All drill and test-pit samples shall be divided and a sufficient portion thereof for accurate analysis shall be delivered to the vendor at such place or places as may be most convenient to the vendee.

3. Yearly Reports.—On or before the first day of April in each year, beginning with 1919, the vendee shall make and deliver to the vendor a written estimate of the amount of iron ore disclosed by the exploratory work carried on during the preceding calendar year, if any is done, in the mines or ore-deposits upon the described lands; such report shall also show the aggregate amount of all iron ore ascertained to exist and then in place in said mine or mines on the 31st day of December next preceding.

Article VII.—Vendee's Covenants as to Methods, etc.

The vendee covenants and agrees that all work and operations on the described lands shall at all times be conducted and carried on in such manner and by such means as shall be in accordance with the

best mining and engineering methods at the time employed on the Mesabi Range, and to that end specifically agrees to pursue and observe, among others, the following methods and regulations:

1. Disposition of Waste.—All earth, stones, and other debris and waste excavated or removed in the process of exploring, mining, or any other work, operation or improvement upon said lands, shall be deposited by the vendee at such convenient and accessible place or places on said lands as shall be agreed upon and designated from time to time by the parties hereto, in writing. In case, however, the parties shall be unable to agree upon such place or places, the vendee shall have the right to deposit such waste and debris at such place or places on any of said described lands as it may select and designate; [fol. 29] provided, it shall first demonstrate by proper exploration that no valuable body of iron ore exists upon the parcel or parcels of land so designated, the mining of which will be interfered with, or rendered more expensive, by such deposit.

2. Mining Methods and Conservation of Ore Deposits.—The vendee shall conduct all its work and operations on said lands in such manner that no unnecessary or unusual waste of ore or mineral shall be caused or permitted, and so that the future mining or removal of any iron ore in or upon said premises, whether the same be now merchantable or not, shall not be unnecessarily or unusually prevented or rendered unreasonably more difficult or more expensive. In the working of any mine or mines on said lands, the vendee will remove all merchantable iron ore encountered therein clean as it goes, in accordance with the best mining practice. If any portions of said lands, or of the mineral deposit therein, have not already been thoroughly explored, the vendee shall and will explore the same by test pits, drill-holes, drifts or raises in advance of mining thereon, in order to insure the proper laying out of mining plans and the adoption of the best methods of mining or removing the iron ore therein. Before mining operations shall be begun by the vendee plans therefor shall be prepared and shall be submitted to the vendor for approval and if and when so approved, the vendee shall conduct its operations in accordance therewith. But in case the vendor does not approve such plans and the parties shall be unable to agree as to the plans or methods so to be adopted and applied, or subsequent modifications thereof, the same shall be determined by arbitration as provided in Article XVIII hereof.

3. Stockpiling.—In order to permit the convenient operation of said lands hereunder by the vendee, and to conserve the ore which may be mined therefrom, but not shipped, the vendee is hereby authorized and empowered to place the same in stockpiles upon said lands; but it is mutually agreed that ore so stockpiled shall be classified as follows: (a) Ore having an average mineral content of forty-nine (49) per centum or more of metallic iron; (b) Ore having an average mineral content or less than forty-nine (49) per centum of metallic iron, but which, by proper treatment or concentration is capable of being rendered merchantable; and (c) Ore having an

average mineral content of less than forty-nine (49) per centum of metallic iron and more than such per centum of metallic iron as may be agreed upon by the parties hereto, from time to time, or, in case of their failure so to agree, as may be fixed by arbitration in the manner provided in Article XVIII hereof and which ore is not then susceptible of being rendered merchantable by any recognized method of concentration or other treatment; but any minimum per centum so determined in respect of stockpiling ores shall not be considered as determining what ores may be wasted or caved in the course of mining operations hereunder. All said classifications to be made of ore when dried at 212 degrees Fahrenheit. Ore mined from said lands belonging to any one of said classes shall be stockpiled separately from ore belonging to either of the other classes. It shall be optional with the vendee whether ore belonging to any of said classes shall be stockpiled at any time; but all ore mined from [fol. 30] said lands belonging to said class "C" which the vendee shall not desire to ship shall be stockpiled by the vendee upon said lands in such manner and location that it may be shipped therefrom at any time thereafter, if and when it shall become merchantable, or may be made merchantable by concentration or other treatment, or may be advantageously used for mixing with other ores. The vendee shall have the right at any time during the life of this contract to ship any class of ore so stockpiled, and all ore so shipped shall be paid for by the vendee at the prices specified in Paragraph 1 of Article IV of this contract, at the time and in the manner in said Article provided. If, during the continuance of this contract in force, the vendee shall not ship said ore, so much thereof as shall remain in stockpile on said lands shall revert to and become the property of the vender, unless all of the ore mined from or contained in said lands shall have been fully paid for as contemplated by the parties and recited in Paragraph 4 of said Article IV excepting such as becomes the absolute property of the vendee under Paragraph 3 of Article XVI hereof.

4. Adverse Liens.—The vendee will protect the lands, and every part thereof, and all buildings and improvements thereon, and all iron ore mined therefrom wherever situated (until the same shall be fully paid for), from all mechanics,' laborers' and material-men's liens, and will keep the title to all of the same free and clear from any cloud or encumbrances arising in any manner whatsoever on account of its mining operations on said lands, the concentration of said ore, or on account of the use and occupation of said lands by the vendee, its agents, servants, employees, or contractors.

5. Encumbrances.—The vendee will not execute any mortgage, trust deed, lien or encumbrance of any kind or any interest in said lands acquired by it under the provisions of this contract, or upon any machinery, fixtures or personal property thereon, or upon any ore mined or removed from said lands (except such ore as shall have become the absolute property of the vendee under the provisions of this contract), which shall not, by its terms, be ex-

pressly subject to the rights of the vendor hereunder, and to its paramount right to enforce any or all of the agreements, covenants and conditions hereof obligatory upon the vendee.

6. Mine Maps and Plats.—The vendee will prepare and deliver to the vendor, as soon as may be after the first day of January of each year, complete, accurate and detailed mine maps or plats or blueprints showing, as accurately as possible, the nature and extent of all surveys and operations of the vendee upon the lands and in each mine or ore deposit thereon, up to the last day of the preceding year.

7. Assignment and Subletting.—The vendee will not, either directly or indirectly, by operations of law or otherwise, assign this contract, or any right or interest herein, or sublet the lands, or any part thereof, without the written consent of the vendor, except that this paragraph shall not prevent the assignment of this contract without such consent to a responsible company formed or to be formed on any reorganization of the vendee or its affairs, voluntarily or under direction of Court.

[fol. 31] ' Article VIII.—Sampling and Analysis

All ore mined from the lands described in Article I hereof, shall, before being mined, whether by open-pit or under-ground operations, be sampled in place, the samples to be taken from drill-holes, test-pits, drifts, or raises, and analyzed for the purpose of ascertaining the iron, phosporous, silica, alumina and manganese content thereof.

All ore or ore-formation mined from said lands (whether shipped as merchantable ore direct, or as crude ore to concentrating plant, on or off the premises, or placed in stockpile) shall be carefully sampled by the vendee in such manner as to show the true average character thereof; such samples shall as soon as practicable thereafter, be assembled for analysis, in quantities representing approximately two hundred (200) tons in the aggregate and shall be dried at 212 degrees Fahrenheit, and thereafter analyzed by competent and experienced chemists, and the actual percentage of metallic iron, phosphorous, silica, alumina and manganese contained therein determined; and copies of all such analyses shall be given to the vendor forthwith. The analysis for computing the purchase price shall be made in the manner above provided, from samples taken at time of shipment direct, or of transmission to concentrating plant, on or off the premises; but when analyses are made of less than 200 tons, they shall govern.

The vendee shall have special samples taken for the purpose of ascertaining the true moisture content of all ores mined from said lands as often as may be necessary, and such moisture samples shall be taken in accordance with the best approved methods and the determination made by practical, competent and experienced chemists so as to determine the actual percentage of moisture contained in the ore.

On request of the vendor the vendee shall divide the pulp of such samples as the vendor shall wish to have analyzed, for the purpose of checking results or to be kept as a record.

The vendee shall and will furnish the vendor each day, or as soon thereafter as practicable, with a certificate, signed by the person or firm making the analyses of the said samples of ore, showing the result of each analysis made of the preceding day's samples of iron ore, including the numbers and dates of samples; and the vendee shall also furnish to the vendor, on or before the 20th day of each calendar month, statements showing separately the quantity of ore, actual and estimated, and the general average of all analyses made during the preceding calendar month, of all such ore shipped from said lands, and of all ore of each class placed in stockpile. The vendee shall also furnish upon application of the representative of the vendor, the numbers of the samples and cars included in samples in such manner as may serve to identify check samples of corresponding cars to be taken by the vendor.

Article IX.—Shipping and Weighing Ore

1. Shipping Statements.—The vendee shall and will keep an accurate record of each and every car of ore loaded for shipment from the said lands, and shall furnish the vendor with daily statements showing the car number and initials of each and every car, [fol. 32] together with the mine shipping bill number, and whatever information shall be necessary to complete the shipping record of each car.

2. Weighing Ores.—The vendee shall and will cause all iron ore mined upon the said lands and shipped by the vendee to be weighed by the Railway Company transporting the same, if it be transported by a public carrier, and if transported over any other tracks, or otherwise transmitted to concentrating plant, the vendee will cause said ore to be weighed upon scales complying with the regulations of the Railroad and Warehouse Commission of the State of Minnesota to be installed and maintained by the vendee upon said lands, or lands adjacent to concentration plant. The vendee shall furnish the vendor, as soon as possible after the ore is weighed, with accurate tissue copies of the railroad waybills in all cases where said ore shall be transported by a public carrier, and in cases where the same is transported over other tracks or is otherwise transmitted to concentrating plant, with the written certificate of the weigher in charge of said scales installed by the vendee as aforesaid. All such waybills and certificates shall contain the car number and the weight in pounds of the contents of each car of ore; and as early as possible in each month, the vendee shall furnish the vendor with a certificate of said railway company, or of said weigher, showing the total weights of all such ores transported and weighed, or otherwise transmitted during the preceding calendar month; and it is mutually agreed that any certificate or statement in writing signed by such weigher stating the weights of any ore weighed by him, and any certificate or state-

ment in writing signed by any officer or agent of the railway company so transporting any such ore that said company has received for transportation any iron ores from said lands at any time or times, and stating the weights thereof, and that any copies or transcripts from the books of any railway company relating to the transportation or weights of such ores as aforesaid, and signed by any such officer or agent, shall be prima facie evidence of the facts so stated or appearing, in any suit at law or in equity, or in any controversy between the parties hereto, or their successors in interest, or in or before any court of reference or arbitration.

The right is hereby conceded, however, to either party to inspect, review and test the correctness of any scales or weights used in weighing said ore, and any reports of any such weigher or railway company, at such time, and in such manner, as either may choose to adopt; it being mutually understood and agreed that any errors shown to exist shall, when ascertained, be cognizable and corrected, and any difference caused thereby shall be adjusted and paid for upon the next regular quarter-day.

The vendor shall have the right at all times to provide a competent person to weigh upon the scales installed by the vendee any of said ore transported over other tracks than those of a public carrier, or otherwise transmitted to concentrating plant, and, in such case, it is agreed that the salary of such weigher and all other expenses connected therewith (but not including the cost of purchasing and installing the scales) shall be borne equally by the parties hereto.

[fol. 33] Article X.—Reports of Mining Operations

On or before the 20th day of each calendar month, during the continuance of this contract in force, the vendee shall and will render to the vendor a statement in writing showing the amount of iron ore mined from each mine or ore-deposit upon said lands during the preceding month, or since the last preceding statement (if any iron ore shall have been mined on said lands during such time), and the amount of each class thereof placed in stockpile; such statements shall contain such information as the vendee shall have kept or acquired as to the ore mined on said lands, and shall be made up of the mine tally and other records of ore taken from each mine or ore-deposit, and shall contain all other information which the vendee may have as to the amount of ore taken from the respective mines or ore deposits upon said lands for shipment or for stockpiling, as fully as the vendee shall have or obtain such information for its own use and benefit.

Article XI.—Minerals Other Than Iron

It is mutually agreed that, in case any ores or minerals other than iron ores and manganese ores, or any mixtures or combinations of ores or minerals which shall have a greater market value than for the iron ore and manganese therein contained, shall be discovered upon the said lands, the vendee may mine and remove the same; and

for all such other ores, minerals, mixtures or combinations mined and shipped from the said lands by the vendee, the vendee shall pay to the vendor as purchase price thereof thirty (30) per cent of the market value or bona fide selling price thereof at the market or markets therefor, after all transportation charges have been deducted from such market or selling price. Such purchase price shall be due and payable at the same time and in the same manner as advance payments of purchase price upon iron ore shipped under the terms of this contract; and reports of the kind, quality and quantity of such other ores, minerals, mixtures or combinations, and of the market or selling price thereof at the place of market, and of all transportation charges thereon, shall be made at the same time and in the same manner provided in this contract for reports upon iron ores.

In case the vendee shall elect to mine any such ore but shall not elect to ship said ore or mixture or combination, it shall place the same in stockpile on the said lands upon which the same shall be found in a place and manner convenient for shipment, and the same shall, if the vendee so elects, upon payment therefor as above provided, become and be the property of the vendee, and the vendee shall have the right to keep the same in said stockpile without charge or interference on the part of the vendor, and, while this contract remains in force, to remove the same, or empower any purchaser thereof or any other person to enter upon said lands and remove the same.

Article XII.—Taxes

Prior to the time when any penalty or increase shall attach thereto, the vendee shall pay all taxes and assessments, ordinary and extra- [fol. 34] ordinary, general and specific, which may be levied or assessed upon the said lands, and the whole thereof, and upon the iron ore mined thereon, and upon all improvements, erections and personal property thereon from and after the date hereof, and, in addition thereto one-third of all taxes and assessments levied for the year 1917 upon said lands; and the vendee shall pay all taxes and assessments levied as aforesaid for each year thereafter while this contract shall remain in force, except that it shall only be required to pay that proportion of the taxes levied for the tax-year in which this contract is terminated equivalent to the part of said year during which this contract is in force. The intent hereof being that the vendee shall pay altogether taxes for a period equivalent to the time that this contract is in force. And the vendee shall furnish the vendor, from time to time as taxes may be paid, with duplicate tax receipts showing the payment of all such assessments or taxes, provided, however, that the vendee shall always have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same to be unlawful, unjust, unequal, or excessive, or to take such other steps or proceedings as it may deem necessary to secure the cancellation, reduction, readjustment or equalization thereof, before it shall be required to pay and

discharge the same, or any part thereof; provided, further, that the vendee shall not permit or suffer said lands, or any part thereof, or any of the structures, improvements, or personal property thereon, to be sold at any time for any tax or assessment.

The vendor shall indemnify and save harmless the vendee against loss or expense on account of any levy or assessment of any taxes for any year or years prior to the execution of this contract, the intention being to protect the vendee against any assessment for back taxes on account of any lands which may have escaped assessment or have been inadequately assessed in prior years.

Article XIII.—Rights of the Vendor

1. Title to Ore and Vendor's Lien.—It is mutually agreed that the title to the iron ore hereby sold to the vendee shall be and remain in the vendor, as security for the performance of this contract by the vendee, until the purchase price of such ore as shall be mined and shipped from said lands or mined, treated and shipped, and taxes and all other payments accruing and due hereunder, shall have been fully paid, and the vendor shall at all times have, possess and hold a lien upon all iron ore mined from said lands and shipped therefrom but not sold to a bona fide purchaser until the purchase price therefor shall have been paid, and upon all machinery, personal property and improvements placed upon said lands by the vendee, as security for any unpaid balance of money due hereunder, and as security for the performance by the vendee of each and all of the covenants and conditions hereof obligatory upon it; which liens may be enforced against any such property in like manner as liens conferred by chattel mortgages, or by any other lien security, are, or may be, entitled to be enforced under the laws of any state where such ore or other property may be situated; provided, however, that [fol. 35] the title above reserved and the lien herein provided for shall not prevent or affect the sale of ore from said premises in the ordinary course of business, or attach to and follow any ore sold by the vendee in good faith and shipped from the premises to a bona fide purchaser thereof.

2. Insolvency of Vendee.—If the vendee shall become insolvent at any time during the continuance of this contract, the vendor shall have the continuing right to demand payment of the purchase price of all ore mined on the described lands before its removal therefrom by the vendee, as well as all current payments for instalments of purchase price then due and payable under the terms of this contract, and payments of all taxes for the current year and of all other sums which shall or may be due or payable under the terms of this contract (or, in lieu of such payments, that the same shall be secured to the satisfaction of the vendor), in advance of, and as a condition of, any further shipment by the vendee of ore from said premises, or the removal by the vendee of ore from said lands, or the removal by the vendee of any structures or fixtures, or any machinery or other personal property upon said lands.

3. Suspension of Right to Remove Ore.—Whenever any payment of instalments of purchase price or taxes shall become due and remain unpaid after the time or times in this contract provided, the vendor may, at the end of ten (10) days, after written notice given by the vendor specifying the default, suspend the right of the vendee to remove from said lands any ore, until such minimum instalments of purchase price, or such taxes, are paid; and thereafter all further removal of ore from said lands shall cease on the part of the vendee until the default complained of shall be remedied.

4. Termination by Vendor.—This contract is made by the vendor and accepted by the vendee, upon condition that, if the purchase price of the iron ore herein referred to, including the advance payments therefor herein agreed to be made by the vendee, or any part of either thereof, be and remain unpaid after the days and times specified therefor, or if the vendee shall fail to keep any of the other covenants, agreements or conditions herein expressed to be kept, performed or observed by the vendee, and if any such failure shall continue for thirty (30) days after the vendor shall have given notice in writing to the vendee specifying any such default, neglect or failure, then and thenceforward, and in either of said events, it shall be lawful for the vendor, with or without process of law or judgment, to enter upon and take possession of said lands or any part thereof, in the name of the whole, together with all ores, machinery, fixtures, improvements and personal property thereon, and to possess and hold the same, and to exclude, forcibly if necessary, and without being guilty of trespass or other wrongful act, the vendee and all persons claiming under the vendee, and, at the election of the vendor, to declare this contract cancelled and determined and all right, title and interest acquired hereunder by said vendee to be revested in the vendor, by giving to said vendee thirty (30) days' notice in writing of the intention of said vendor to cancel and determine this contract and to annul all right, title and interest acquired hereunder by said [fol. 36] vendee, it being mutually understood and agreed that notice of thirty (30) days is a reasonable and sufficient notice so to be given to said vendee in case of its failure to perform any of its said covenants herein, and shall be sufficient to cancel all obligations herein on the part of said vendor and fully to revest it with all right, title and interest hereunder then remaining in the vendee; and all payments made by the vendee on this contract, and all its right, title and interest in all ore not then paid for, and the buildings or improvements of every kind upon said lands shall thereupon vest in the vendor, and such payments, ore, buildings and improvements may be retained by said vendor in liquidation of the damages sustained by it on account of such default. Said vendor, in lieu of the notice of cancellation hereinbefore prescribed, may, at its option, terminate this contract, after the thirty days' written notice of default hereinabove prescribed, in any manner then provided for by the laws of the State of Minnesota. Any such re-entry on the part of the vendor shall be without prejudice to any other remedy or proceeding which the vendor may have in law, equity or otherwise by reason of any

breach of any covenants, promise or agreement of the vendee herein contained, or for the recovery of possession of said premises.

In case the vendor shall give notice of termination of this contract, as hereinabove provided, upon the ground that the vendee has failed to keep, observe or perform any of the conditions imposed upon it hereunder respecting the method of mining or grading of ores, or the conduct of any of its operations upon said lands, and such default shall be denied by the vendee, the vendee shall have the right to demand arbitration in respect to such alleged default in the manner provided by Article XVIII hereof, and the time consumed in such arbitration shall not be counted as a part of the thirty (30) days hereinbefore provided for, but, in event the decision of the arbitrators shall be in favor of the contentions of the vendor so made, then the vendee shall have the period of thirty (30) days from the filing of their decision by the arbitrators within which to cure such default. And, in case or to the extent that the same cannot be cured by performance on the part of the vendee, any damages sustained by the vendor, from the time of notice of such default claimed by the vendor, shall be assessed by said arbitrators and the damages so awarded shall be paid by the vendee forthwith.

5. Retention of Advance Payments of Purchase Price.—Except as provided in Article IV, Section 4, above, the vendor shall not, in any event, be liable or required to repay to the vendee any sum which has been paid by the vendee as advance payments of purchase price for ore. All such payments shall belong absolutely to the vendor as part of the consideration for the execution by it of this contract and of the privilege hereby given to the vendee of terminating the same.

6. Vendor's Right of Inspection and Additional Exploration.—The vendor shall have the right by its officers, agents and attorneys at any and all times to enter upon said lands and every part thereof, and into any mine or ore deposit thereon, and in and upon any lands to which any ore from the premises herein described may have been [fol. 37] removed, for the purposes of inspecting or surveying the lands or any part thereof, of sampling any ore therein or that may be removed therefrom, of measuring the quantity of ore which shall have been mined thereon or therefrom, and of ascertaining the quantity of ore which has been shipped therefrom by the vendee, provided that the work and operations of the vendee shall not be unnecessarily or unreasonably hindered or interrupted thereby. Whenever the vendor shall be of the opinion that ore not already disclosed may exist on said lands on or above any level or levels on which the vendee shall then be operating the vendor shall have the right to notify the vendee in writing to explore the lands, or any part thereof, by test-pitting, drilling, drifting, or sinking or raising through the ore formation, specifying in such notice the place where such work shall be done and the particular method required. Within ten (10) days after the receipt of such notice, the vendee shall proceed to comply with the requirements of such notice and, if an ore body of sufficient size and value to warrant the expenditure so involved shall be disclosed as the

result of the work so prosecuted, then the expense of such work shall be borne by the vendee, otherwise the same shall be borne by the vendor and shall be paid forthwith upon demand of the vendee. Should the vendee fail upon such notice to proceed with such work, then the vendor may, if it sees fit, enter upon the land and itself prosecute such explorations, subject to the provisions hereinabove set forth as to payment therefor. But such exploration shall not be required hereunder by the vendor, prior to the first day of January, 1953, except for the purpose of insuring the discovery and mining of such ore as may be merchantable, or may be rendered merchantable by treatment as herein provided, contiguous to, and susceptible of being profitably mined and removed by the vendee through, the workings in which the vendee is then operating; nevertheless, for the purpose of deriving information upon which to base accurate estimates of the quantities of ore in place on said lands, in order to fix the annual minimum payments of purchase price to be made during the last ten years of the term of this contract (as provided in Paragraph 4 of Article IV hereof), the vendor may require explorations as herein specified at any time after January 1, 1953.

Nothing herein contained shall be construed to require the vendee to do any further exploration work at any time after it may have given notice of its intention to terminate this contract as herein permitted.

Article XIV.—Structures and Fixtures

It is hereby further covenanted and agreed by and between the parties hereto that all shaft houses, shaft timbers or supports placed at or in any mine upon the lands, or any timber, steel or concrete framework necessary to the use and maintenance thereof, or of shafts or drifts therein, or of approaches thereto, or any tramway within any mine constructed or placed upon the lands during the term of this contract, shall become and be a part of and belong to the land upon which the same may be, and neither the vendee, nor any person claiming under it, shall, during the continuance of this contract (un-[fol. 38] less all of the ore of the character and quality required to be removed by the terms of this contract has been removed from the mine or mines at which such structures have been erected or improvements made), destroy, take down, remove or injure the same, except for the purpose of replacing the same with other similar property of equal or greater value and of greater or equal efficiency; provided, however, that nothing in this Article contained shall prevent or prohibit the vendee from removing at any time any shaft houses, or tracks or tramways in any mine, upon said land, when the same shall no longer be necessary or needed in or for the future operations of such mine, or to make such changes in the supports or timber or framework in any such mine, or the approaches thereto, or the tramways within the same, as shall be necessary in carrying on the mining operations at any such mine, or by reason of a change in the method of operating any such mine.

Article XV.—Termination by Vendee

Upon the consideration and condition that all of the covenants, agreements and conditions herein expressed, obligatory upon it, shall have been, to that time, fully kept, observed and performed by the vendee, and all paym-nts of purchase price of that portion of the ore hereby sold which shall have been mined and shipped by the vendee shall have been fully paid and discharged, together with all taxes and other sums then due and payable under the terms hereof, it is mutually agreed that the vendee shall have the right at any time prior to January 1, 1958, upon six months' notice in writing given by it to the vendor, to terminate this contract, and this contract shall terminate six months after the receipt of such notice by the vendor.

And it is mutually agreed that in case his contract be not terminated, as provided in this Article, before January 1st, 1958, the same shall continue in force until all of the merchantable iron ore on the premises herein described and all the ore therein that may be made merchantable, as contemplated by Paragraph 4 of Article IV hereof, shall be mined or shall be paid for by the vendee on or before the 31st day of December, 1967, in the manner specified in Paragraph 4 of Article IV hereof. And in case all of said ore shall be so paid for before the same shall be mined from said lands or shipped therefrom, it is further mutually agreed that the term of this contract shall thereafter, at the election of the vendee, be extended for such period as the vendee may desire in order to permit the mining or shipment of all such ore in or upon said lands which has been fully paid for by the vendee or which it may elect to pay for under the provisions of Paragraph 3 of Article XVI hereof; provided, that during any such period of extension the vendee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the said lands in the same manner as if the term of this contract as originally fixed had not expired.

Article XVI.—In Case of Termination of Contract

In case of the termination of this contract, in accordance with the provisions hereof:

[fol. 39] 1. Peaceable Surrender by Vendee.—The vendee shall and will peaceably surrender the lands to the vendor, with all stopes, supports, shafts, and other improvements that may have been made thereon, all in good order and condition, and all ore thereon or therein in stockpile or otherwise, except as specified in Paragraph 3 of this Article.

2. Removal of Machinery, etc., by Vendee.—The vendee shall have ninety (90) days after such termination in which to remove all engines, tools, machinery, railway tracks, structures of every kind and all other property of every nature and description erected or placed by the vendee upon the lands; provided, that all taxes and all advance payments of purchase price and other moneys due to the vendor hereunder, shall have been paid, and all other conditions, cov-

enants and agreements obligatory upon it, shall have been fully performed, by the vendee; but the vendee shall not be deemed authorized by this Article to remove or impair, and shall not remove or impair any supports placed in any mine upon said premises, or any timber, steel or concrete framework necessary to the use or maintenance thereof, or if any shaft houses, shafts or drifts therein, or of approaches thereto, or any tramway within any mine; and, on failure of the vendee to remove any property, hereby authorized to be removed, within said ninety (90) days, all of the same remaining upon said lands shall belong to and become the property of the vendor.

3. Payment for Ores Mined.—When this contract shall expire or be terminated, any iron ore mined from said lands then situated thereon, or upon any other lands, of which the purchase price shall not have been paid in full, may be paid for by the vendee at the prices hereinbefore provided, and it shall thereupon become the absolute owner thereof; and any ore upon the lands herein described, or upon any other lands, which shall have been mined and paid for by the vendee, by the application of advanced instalments of purchase price, or otherwise, shall be its absolute property, and the vendee shall have the right to designate and select the ore to which such payment shall be applied; and in either event the same may be removed by the vendee, within a reasonable time thereafter, without objection or interference by the vendor, except as provided in Paragraphs 1 and 3 of Article XIII hereof.

4. Final Payments Hereunder by Vendee.—All sums of money, including taxes, which shall be or become due and payable under this contract up to the time of the termination of the rights of the vendee hereunder, must be, and will be, paid by the vendee, upon settlement and adjustment of the amount thereof, within thirty (30) days after such termination. And any ores then in stockpile which the vendee may elect to buy under the provisions of the preceding paragraph of this contract, shall be paid for within said period of thirty (30) days upon the basis of the analyses and weights thereof as ascertained and reported at the time of placing the same in stockpile; but when all of the same shall have been shipped from said premises by the vendee, an adjustment of the purchase price thereof [fol. 40] shall be made forthwith upon the basis of actual weights and analyses ascertained, as herein provided, at the respective times of shipment thereof, and such further payments by the vendee, or refundments by the vendor, shall be made as will cause the purchase price to conform to such final analyses and weights.

5. Discharge of Contracts.—The vendee must and will forthwith execute and record in the office of the Registrar of Titles of Itasca County, Minnesota, whenever the described lands shall be surrendered under the terms hereof, a formal relinquishment and discharge of this contract, and a release from the terms hereof of all of said lands, and in and by such instrument the vendee must and will expressly re-convey and surrender to the vendor all of its right, in-

terest and property in and to any and all of the iron ore hereby sold to the vendee, which shall not have been mined and shipped therefrom or paid for pursuant to the provisions of Paragraph 3 of this Article, at the date of such surrender or termination.

Article XVII.—Notices, Reports, etc.

All notices, statements, reports or other communications, authorized or required by any provision of this contract, may be made or given by either party to the other, by depositing the same in the United States mail, postage prepaid, and duly registered, addressed, if to the vendee at its principal office in the city of ——, and, if to the vendor, at its office in Minneapolis, Minnesota. Any such deposit shall be deemed good service or delivery of any such notice, statement, report, or other communication, upon the expiration of twenty-four (24) hours after the time of registration thereof at a United States post office. Any payments to be made pursuant to this contract to the vendor shall be made to it at its place of business.

Article XVIII.—Arbitration

It is mutually covenanted and agreed that in case any difference or controversy shall arise between the parties hereto respecting the due observance by the vendee of the provisions of this contract obligatory upon it relating to the mode of opening, developing or working any mine or mines upon the described lands; or respecting the mining plans to be adopted; or respecting other matters hereinbefore specified to be arbitrated or which the parties may hereafter agree to arbitrate, shall be submitted to arbitration, to be initiated and conducted as follows:

Either party may require arbitration by serving upon the other a demand therefor, in writing, specifying the matter to be submitted to arbitration and nominating some competent, unbiased and wholly disinterested person to act as arbitrator; within ten (10) days after receipt of such written demand and nomination, the other party shall, in writing, nominate a competent, unbiased and wholly disinterested arbitrator, and the two arbitrators so designated shall select a third and give immediate written notice of such selection to both parties, and shall fix in said notice a time and place for the first meeting of the arbitrators not later than ten (10) days thereafter, at which time and place both parties may apppear and be heard.

[fol. 41] In case either party shall fail to make a selection upon notice as aforesaid from the other party, or in case the arbitrators so selected by the parties fail to agree upon a third arbitrator, within ten (10) days, then such arbitrator or arbitrators may upon application made by either party, after ten (10) days' written notice thereof to the other party, be appointed by any judge of any State or Federal Court of record having jurisdiction within the State or Federal judicial district in which the question or matter in dispute shall arise.

Said arbitrators shall meet at the place appointed as aforesaid after having given each of the parties not less than ten (10) days' written notice of the time and place of such meeting, and,, after hearing the parties in regard to the matter in dispute, and taking such other testimony and making such other examinations and investigations as justice shall require and as such arbitrators may deem necessary, hear and decide the questions submitted to them.

They shall make in writing their award or decision upon the question or questions, or matter or matters, in dispute submitted to them, and shall serve a copy thereof upon each party hereto; and the award or decision of such arbitrators or a majority of them shall be final and binding upon the parties hereto, and shall have the legal effect of an award or decision judicially made or determined upon regular proceedings had in a court of competent jurisdiction: and each and every party hereto shall immediately conform to, and in all respects render prompt and full compliance with, every such award or decision.

The expense of such arbitration shall be divided between the parties hereto share and share alike, unless otherwise specified in the award.

In all cases where the nature of the question to be arbitrated shall require the expert knowledge of mining engineers or other experts in any branch of the business, such persons shall be appointed as arbitrators; and, if the parties cannot agree upon the competency of the arbitrators selected, the same shall be appointed by a judge as aforesaid; but any objection to the competency of an arbitrator shall be made in writing before any hearing in the arbitration is entered upon.

Any difference or controversy, subject to arbitration under the terms of this contract, that may arise between the parties as to the construction and carrying out of this contract, or the rights of the parties hereunder, or the transaction of business under the provisions hereof, shall not interrupt the performance of the contract or the continuance of business hereunder; but such business shall continue to be transacted, and settlements and payments shall be made hereunder, in the same manner in which the same had been transacted and made prior to the arising of such difference or controversy, until the matters of difference shall be finally determined by the arbitrators as hereinbefore provided, and thereupon such payments or restitution shall be made as may be required by the decision of the arbitrators.

It is expressly agreed, however, that, if such controversy or difference shall arise by reason of the claim by the vendor that any method of mining or other operation employed by the vendee is wasteful and contrary to the provisions of this contract relating to mining methods, then, and in such case, the arbitrators shall assess [fol. 42] the damages, if any, accruing to the vendor by reason of the employment of the method complained of, from the time of the service of written complaints of such method by the vendor upon the vendee, and the damages so awarded shall be paid forthwith by the vendee.

Article XIX.—Definitions

1. "Shipments."—The word "shipments" or "shipped," as used in this contract, shall be construed to refer to the removal by the vendee of any ore from the said lands for transportation to dock or place of consumption, or for the purpose of concentrating and treating the same.

2. "Tons."—The word "ton" wherever used herein is understood to mean the long ton of two thousand and two hundred and forty (2,240) pounds avoirdupois.

3. "Merchantable Ore."—The term "merchantable ore," as herein used shall be construed as meaning the ore in the said lands which, taken in connection with all the other ore therein available for mixing therewith in the ordinary course of mining operations, will make an average product which will meet the market requirements and which can be sold on the market at a reasonable profit to the vendee at the time when the question of marketability arises, after payment of the purchase price thereof as herein specified; but this clause shall not require the mixing of Bessemer with non-Bessemer ore so as to affect its character or saleability as Bessemer ore.

Article XX.—Binding Effect of This Contract

All of the agreements, covenants, conditions and provisions of this contract shall run with the land, and shall inure to the benefit of, and be obligatory upon, the grantees, successors and assigns of the vendor and vendee, respectively, as well as upon said parties themselves.

In witness whereof the vendor and vendee have caused this instrument to be executed in quadruplicate, the day and year first above written.

[fol. 43] Exhibit No. 3 to Bill of Complaint

Chapter 226 Laws 1923

An Act Providing for the Levy and Collection of a Tax on Royalty Received by the Owner of Any Right, Title or Interest in Land Stituate in This State for Permission to Explore, Mine, Take out, and Remove Ore from the Same.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. There shall be levied and collected upon all royalty received during the year ending December 31st, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

Sec. 2. For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, corpartnerships, associations, companies and corporations.

Sec. 3. Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

Sec. 4. It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty

2. The amount of royalty paid on each tract of land separately.

3. The name and postoffice address of each person to whom royalty is paid, and

4. Such other information as said commission may require.

Sec. 5. Upon the receipt by the Minnesota Tax Commission of the report provided for in Sec. 3 of this Act, it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its [fol. 44] certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act at the time and in the manner therein provided, there shall accrue upon

the tax herein imposed a penalty in an amount equal to ten per cent (10 per cent) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

Sec. 10. The state treasurer within ten days days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to [fol. 45] the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court, when so obtained and properly docketed, shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11 Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11th, 1923.

[fol. 46] EXHIBIT NO. 4 TO BILL OF COMPLAINT

General Statutes of Minnesota, 1913, Relating to Taxation

Sec. 1972. Real Property Defined.—Real property, for the purposes of taxation, shall be construed to include the land itself, and all buildings, structures, and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, quarries, fossils, and trees on or under the same.

Sec. 1973. Mineral, Gas, Coal, Oil, etc.—That whenever any mineral, gas, coal, oil, or other similar interests in real estate are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, such mineral, gas, coal, oil or other similar interests may be assessed and taxed separately from such surface rights and interests in said real estate and may be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes.

Sec. 1974. Personal Property Defined.—Personal property, for the purposes of taxation shall be construed to include:

1. All goods, chattels, moneys and effects.
6. Credits of every kind.

9. All personal estate of moneyed corporations, whether the owners thereof reside in or out of the State.

Sec. 1988 as amended by Chap. 140 Laws 1923. Classification of Property.—All real and personal property subject to a general property tax and not subject to any gross earnings or other lieu tax is hereby classified for purposes of taxation as follows:

Class 1. Iron ore whether mined or unmined shall constitute class one (1) and shall be valued and assessed at fifty (50) per cent of its true and full value. If unmined, it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located, other than the ore, shall be classified and assessed in accordance with the provisions of classes three (3) and four (4) as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located, and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot.

Class 2. All household goods and furniture, including clocks, musical instruments, sewing machines, wearing apparel of members of the family, and all personal property actually used by the owner for personal and domestic purposes, or for the furnishing or equipment of the family residence, shall constitute class two (2) and shall [fol. 47] be valued and assessed at twenty-five (25) per cent of the full and true value thereof.

Class 3. Live stock, poultry, all agricultural products, except as provided by class three "a" (3a), stocks of merchandise of all sorts together with furniture and fixtures used therewith, manufacturers' materials and manufactured articles, all tools, implements and machinery whether fixtures or otherwise, except as provided by class three "a" (3a) and all unplatted real estate, except as provided by class one (1) hereof, shall constitute class three (3) and shall be valued and assessed at thirty-three and one third (33⅓) per cent of the true and full value thereof.

Class 3a. All agricultural products in the hands of the producer and not held for sale, and all agricultural tools, implements and machinery used by the owner in any agricultural pursuit shall constitute class three "a" (3a) and shall be valued and assessed at ten (10) per cent of the full and true value thereof.

Class 4. All property not included in the preceding classes shall constitute class four (4) and shall be valued and assessed at forty (40) per cent of the full and true value thereof.

Sec. 1975. Other Definitions.—Subd. 5—"True and full value" shall mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment; being the price which could be obtained therefor at private sale, and not a forced or auction sale.

Sec. 2316 as amended by Chap. 102 Laws 1923. Moneys and Credits.—As used in this section the word "money" means gold and silver coin, treasury notes, bank notes and other forms of currency in common use; and the word "credits" means and includes every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due, and all shares of stock in corporations the property of which is not assessed or taxed in this state.

As hereinbefore defined, money and credits are hereby exempt from taxation other than that imposed by this act and shall hereafter be subject to an annual tax of three (3) mills on each dollar of the fair cash value thereof. But nothing in this act shall apply to money or credits belonging to incorporated banks located within this state, nor to any indebtedness on which taxes have been properly and fully paid under the provisions of Sections 2301-2309, General Statutes of Minnesota 1913, nor to moneyed capital in the hands of individual citizens of this state coming into competition with the business of national banks; provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

[fol. 48] Minnesota State Constitution, Article 9, Section 1.—Power of Taxation: Taxes shall be uniform upon the same class of subjects. * * *

Article 1, Section 7. Due Process of Law.—No person shall * * * be deprived of life, liberty or property without due process of law.

Article 1, Section 13. Private Property for Public Use.—Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured.

Article 4, Section 33. Special Legislation Prohibited.—In all cases when a general law can be made applicable no special law shall be enacted and whether a general law could have been made applicable in any case is hereby declared a judicial question and as such shall be judicially determined without regard to any legislative assertion on that subject.

Article 4, Section 34. General Laws.—The Legislature shall provide general laws for the transaction of any business that may be prohibited by Section 1 of this amendment (Section 33) and all such laws shall be uniform in their operation throughout the State.

[fol. 49] Return on Service of Writ

United States of America,
District of Minn., ss:

I hereby certify and return that I served the annexed Bill of complaint on the therein-named Sargent Land Co., a corporation, by

handing to and leaving a true and correct copy thereof with John O'Brien, as Secretary of the above named corporation, personally at Mpls. in said District on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minn., ss:

I hereby certify and return that I served the annexed Bill of Com*pal*int on the therein-named J. A. O. Preus, as Governor of Minnesota, by handing to and leaving a true and correct copy thereof with H. C. Samuelson, as Executive Clerk of the Governor, personally at St. Paul in said District on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Bill of Complaint on the therein-named Henry Rines, as State Treasurer of Minnesota by handing to and leaving a true and correct copy thereof with W. C. Martin, Chief Deputy Treasurer personally at St. Paul, in said District on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol. 50] Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Bill of Complaint on the therein-named Raymond P. Chase, as State Auditor of Minnesota by handing to and leaving a true and correct copy thereof with M. J. Desmond, as Chief Deputy Auditor personally at St. Paul in said District on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Bill of Complaint on the therein-named Odin Halden a member of the Minnesota Tax Commission and Clifford L. Hilton, Attorney General of Minnesota, by handing to and leaving a true and correct copy thereof with each of them personally at St. Paul in said District on the 10th day of January, A. D., 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Bill of Complaint on the therein-named Samuel Lord and J. G. Armson, Members of the Minnesota Tax Commission by handing to -- leaving a true and correct copy thereof with Odin Halden, Chairman of the Minnesota Tax Commission personally at St. Paul, in said District on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT SARGENT LAND COMPANY—Filed Feb. 9, 1924

The above named defendant, Sargent Land Company, for its separate answer to the Bill of Compaint of plaintiff in the above entitled cause respectfully represents and states to the Court as follows:

(1) This defendant admits the allegations set forth in paragraphs (1), (2), (3), (4), (5), (6), (7), (8), (9), and (10), except that in said paragraph (10) defendant has no knowledge or information sufficient to form a belief as to whether the diminution of the distributive shares of the stockholders of this defendant by the payment by this corporation of the royalty tax referred to in said complaint will be unlawful, or will unlawfully interfere with and prevent the carrying out of the purposes for which this defendant was created; and this defendant also admits the allegations set forth in paragraphs (12), (13), (14), (21) and (22) and each of them in [fol. 52] said Bill of Complaint contained; but this defendant denies any knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraphs (11), (15), (16), (17), (18), (19) and (20) therein contained and therefore denies the same.

(2) This defendant further answering alleges that on the 31st day of January, 1924, it duly made its verified report, as required by Chapter 226 of the laws of 1923, and duly filed the same with the Minnesota Tax Commission described in plaintiff's Bill of Complaint, which said report correctly set forth the amount of royalty received by defendant during the calendar year 1923 under and by virtue of the four mining leases described in paragraph (6) of plaintiff's Bill of Complaint, and also the amount of payments received

by this defendant during the calendar year 1923 under and by virtue of the sale agreement set forth in paragraph (7) of plaintiff's Bill of Complaint.

(3) That on or about the 5th day of September, 1923, this defendant sold and conveyed the fee of the North half (N. ½) of the Southwest quarter (S. W. ¼) of section twenty-four (24), township fifty-seven (57), range twenty-two (22) in said report more particularly described, and all the right, title and interest of this defendant therein to the lessee thereof, at and for a consideration in money then and there received by this defendant, and that said lease was simultaneously therewith duly canceled, surrendered and merged, and that no royalties have since been, or will be hereafter, received by this defendant for or on account of said lease, or for or on account of any interest of this defendant in said premises.

(4) That on or about the 31st day of October, 1923, the lease hitherto existing covering the Northeast quarter (N. E. ¼) of the [fol. 53] Northeast quarter (N. E. ¼) of section thirty-two (32), township fifty-seven (57), range twenty-two (22), more particularly described in said report, was duly canceled, surrendered and terminated by the lessee thereof, in accordance with the terms and conditions of said lease, and that no royalties have since been, or will be hereafter, received by this defendant for or on account of said lease, or for or on account of any interest of this defendant in said premises.

(5) That on or about the 31st day of December, 1923, the lease heretofore existing covering the Southwest quarter (S. W. ¼) of the Southwest quarter (S. W. ¼) of section thirty-five (35), township fifty-eight (58), range twenty-one (21), more particularly described in said report, was duly canceled, surrendered and terminated by the lessee thereof as provided under the terms thereof, and that no royalties have since been, or will be hereafter, received by this defendant at any time hereafter for or on account of said lease or for or on account of any interest of this defendant in said premises; that all the merchantable ore has been mined out and removed therefrom, and that none now remains in said premises, as this defendant is informed and verily believes, and that said land is now of little or no value.

Wherefore, this defendant, having thus made a full answer to all the matters and things contained in the Bill of Complaint, offers to abide by the final decision and judgment entered in this suit.

L. P. McNally, Solicitor for Defendant Sargent Land Company, 900 Metropolitan Life Bldg., Minneapolis, Minnesota.

[fol. 54] Sworn to by John O'Brien. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS SAMUEL LORD ET AL.—Filed Jan. 30, 1924

The defendants Samuel Lord, James G. Armson, Odin Halden, Clifford L. Hilton, Raymond P. Chase and Henry Rines, for their joint and several answers to the bill of complaint of the plaintiffs in the above entitled cause, respectfully represent and state to the court as follows:

I

These defendants state that they have no knowledge as to the allegations of paragraph 1 of the bill of complaint, but believe the allegations to be true.

II

These defendants admit the allegations of paragraph 2 of the bill of complaint.

III

These defendants admit the allegations of paragraph 3 of the bill of complaint, except that they allege that the defendant Clifford L. Hilton is a resident of Ottertail County, Minnesota.

[fol. 56] IV

These defendants admit that since December 28, 1909, the articles of incorporation of the defendant Sargent Land Company have stated and do now state the general purposes of said corporation to be as set forth in paragraph 4 of the bill of complaint, and these defendants further state that they have no knowledge or belief as to the other allegations contained in said paragraph 4.

V

These defendants admit that since December 28, 1909, said Sargent Land Company has not been authorized by its articles of incorporation to open, develop or operate mines upon its lands or any of them or elsewhere, as set forth in paragraph 5 of the bill of complaint, and further state that they have no knowledge or belief as to the other allegations contained in said paragraph 5.

VI

These defendants state that they have no knowledge as to the allegations of paragraph 6 of the bill of complaint, but believe the allegations to be true.

VII

These defendants deny that the payments made to said Sargent Land Company, as set forth in paragraph 7 of the bill of complaint,

were not royalties received for permission to explore, mine, take out and remove ore from said lands, and deny that said payments were or are the agreed purchase price paid by the vendee in the sale agreement therein mentioned for the ore therein described, and further state that they have no knowledge or belief as to the other allegations contained in said paragraph 7.

VIII

These defendants state that they have no knowledge or belief as [fol. 57] to the allegations contained in paragraph 8 of the bill of complaint.

IX

These defendants admit the allegations of paragraph 9 of the bill of complaint.

X

These defendants state that they have no knowledge as to the amount of the royalty tax that will be levied against the defendant Sargent Land Company under the provisions of chapter 226, Laws of Minnesota for 1923, but believe that said amount will be large; and they expressly deny that the payment of said tax will unlawfully diminish the distributive shares to which the plaintiffs and other shareholders of said company are entitled in the assets of the company, and deny that the levy and collection of said tax will unlawfully interfere with or prevent the carrying out of the purposes for which the company was created.

XI

These defendants admit that this is a suit brought in equity to restrain the defendants from acting under the provisions of said statute and from carrying out and enforcing the provisions thereof, and expressly deny that said statute or any act done or threatened to be done thereunder violate the constitution of the United States or the constitution of the State of Minnesota in respect of any of the matters set forth in paragraph 11 of the bill of complaint.

XII

These defendants admit the allegations of paragraph 12 of the bill of complaint.

XIII

These defendants admit the allegations of paragraph 13 of the bill of complaint.

XIV

These defendants admit the allegations of paragraph 14 of the bill [fol. 58] of complaint.

XV

These defendants deny the allegations of paragraph 15 of the bill of complaint.

XVI

These defendants deny the allegations of paragraph 16 of the bill of complaint, except that they admit that the lands and ore of said Sargent Land Company in the State of Minnesota are subjected to an annual ad valorem tax, and that no provision is made in said statute for deduction, from the royalties proposed to be taxed thereunder, or any portion thereof as constituting a conversion and return to a taxpayer of capital assets.

XVII

These defendants deny the allegations of paragraph 17 of the bill of complaint.

XVIII

These defendants deny the allegations of paragraph 18 of the bill of complaint.

XIX

These defendants deny the allegations of paragraph 19 of the bill of complaint.

XX

These defendants deny the allegations of paragraph 20 of the bill of complaint.

XXI

These defendants deny that by the payment of the tax bill royalties as required by said statute the funds and assets of said Sargent Land Company will be unlawfully depleted, and deny that the plaintiffs and other shareholders of said corporation will be unlawfully deprived of their property, and further state that they have no [fol. 59] knowledge as to the other allegations of paragraph 21, but believe them to be true.

XXII

These defendants admit the allegations of paragraph 22 of the bill of complaint, except that they deny that the threatened action of the defendants Lord, Armson and Halden as in said paragraph set forth will be wrongful or unlawful.

Having thus made a full answer to all the matters and things contained in the bill, these defendants pray that the bill be dismissed as to them and for judgment for their costs in this behalf incurred.

Dated January 29, 1924.

Clifford L. Hilton, Attorney General; C. A. Youngquist, Assistant Attorney General; Patrick J. Ryan, Solicitors for Defendants Samuel Lord, James G. Armson, Odin Halden, Clifford L. Hilton, Raymond P. Chase, and Henry Rines, 102 State Capitol, St. Paul, Minnesota.

[fol. 60] Sworn to by Samuel Lord. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER AND ORDER TO SHOW CAUSE—Filed Jan. 11, 1924

To each of the above-named defendants respectively:

Whereas in the above entitled case it has been made to appear on the verified bill of complaint filed herein which was on the 7th day of January, 1924, presented to the Honorable Wilbur F. Booth, Judge of the United States District Court for the District of Minnesota, Fourth Division, that a preliminary injunction together with a temporary restraining order until the hearing upon such preliminary injunction are necessary and proper herein, and that prima facia the plaintiffs are entitled to such preliminary injunction and temporary restraining order, restraining the defendants herein from doing the acts complained of and threatened to be committed; and it appearing to the Court that plaintiffs herein would suffer immediate and irremediable damages and injury by the commission of the acts complained of and threatened to be committed by said defendants; in this, that defendant Sargent Land Company may and will as directed by its Board of Directors under resolution passed January 2, 1924, make and file immediately with the said Minnesota Tax Commission a report of all royalties and monies received by said Corporation in the year 1923 for permission to explor-, mine, take out or remove ore, or for or on account of any sale of ore, from land in the State of Minnesota as required by Chapter 226 of the Laws of 1923 of the State of Minnesota and may and will immediately open to the examination and inspection of said Minnesota Tax Commis-[fol. 62] sion all books, way bills, inventories, correspondence and memoranda of said Corporation relating to or used in the transaction of such business as further required by said Act or in default thereof be guilty of a misdemeanor; and that plaintiffs would have no adequate remedy at law therefor, and that said wrongful acts are of such character that they cannot be compensated for in damages, and that said acts will be committed before the hearing of such action and before the hearing upon the application for such preliminary injunction unless a restraining order is issued immediately and without notice to defendants;

Now, Therefore, on motion of the plaintiffs, it is ordered that the defendants, and each of them, appear before this Court at a session to be held in the Federal Building, in the City of Duluth, in the

State of Minnesota, in said District, upon Saturday, the 12th day of January, 1924, at 10 o'clock, in the forenoon of said day, and then and there show cause, if any there be, why the preliminary injunction therein prayed should not issue.

It is further ordered that a temporary restraining order *ne* and is hereby issued:

1. Commanding the defendant Sargent Land Company, its officers and agents and each of them, pending the further order of this court, absolutely to desist and refrain from, and said defendants and each of them are hereby restrained from, making or filing with the Minnesota Tax Commission the verified report or exhibiting to said Commission any of said Corporation's books or papers, in respect of the royalties or moneys received by said corporation in said year 1923 for permission to explore, mine, take out or remove ore, or for or on account of any sale of ore, from land in the State of Minnesota, as required by Section 3 of said Chapter 226 of the Laws of 1923, of the State of Minnesota, or otherwise; and from paying the tax or any part thereof that may be assessed against said corporation under or by virtue of said Chapter 226 and from taking any procedure or steps whatsoever to observe or comply with said Act or any part thereof.

2. Commanding said defendants, other than defendant Sargent Land Company, and each of them, pending the further order of this Court absolutely to desist and refrain from, and said defendants and each of them are hereby restrained from, levying, determining or imposing any tax or any penalties upon such tax under or by virtue [fol. 63] of the provision of said Chapter 226 of the Laws of 1923 of the State of Minnesota as against defendant Sargent Land Company; and from interfering with or harassing defendant Sargent Land Company, or its officers, agents or representatives, with reference to disclosing or furnishing information to the said defendants composing the Minnesota Tax Commission, and from demanding such information from defendant Sargent Land Company, in respect of any royalties or monies received by it in said year 1923 for permission to explor-, mine, take out or remove ore, or for or on account of an*t* sale of ore, from land in the State of Minnesota, as required by said Chapter 226 of said Laws of 1923 of the State of Minnesota; and from taking any further procedure as against defendant, Sargent Land Company under or by virtue of the provisions of said Act, or any of them.

Service of this order shall be made by copy thereof served on the defendants and each of them named in the bill of complaint.

Plaintiffs having given bond for Ten Thousand Dollars ($10,000.00) conditioned according to law, this order is hereby made immediately effective.

This order signed and issued this 7th day of January, 1924.

Wilbur F. Booth, Judge.

[fol. 64] Form No. 282

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Restraining Order & Order to Show Cause on the therein-named J. A. O. Preus, as Governor of Minnesota, by handing to and leaving a true and correct copy thereof with H. E. Samuelson, as Executive Clerk of the Governor, personally at St. Paul, in said District, on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol. 65] Form No. 282

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota:

I hereby certify and return that I served the annexed Restraining Order and Order to Shoe Cause on the therein-named Sargent Land Co., a corporation, by handing to and leaving a true and correct copy thereof with John O'Brien, as Secretary of the above-named corporation, personally at Minneapolis, in said District, on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol. 66] Form No. 282

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Henry Rines, as State Treasurer of Minnesota, by handing to and leaving a true and correct copy thereof with W. C. Martin, Chief Deputy Treasurer, personally at St. Paul, in said District, on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol. 67] Form No. 282

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Reymond P.

Chase, as State Auditor of Minnesota, by handing to and leaving a true and correct copy thereof with M. J. Desmond, as Chief Deputy Auditor, personally at St. Paul, in said District, on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol. 68] Form No. 282

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Odin Halden, a member of the Minnesota Tax Commission and Clifford L. Hilton, Attorney General of Minnesota, by handing to and leaving a true and correct copy thereof with each of them personally at St. Paul, in said District, on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol.69] Return on Service of Writ

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Samuel Lord, and J. C. Armson members of the Minnesota Tax Commission, by handing to and leaving a true and correct copy thereof with Odin Halden, Chairman of the Minnesota Tax Commission, personally at St. Paul, in said District on the 10th day of January, A. D. 1924.

Edward Rustad, U. S. Marshal, by D. C. Horsnell, Deputy.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING HEARING OF MOTION FOR PRELIMINARY INJUNCTION

The above entitled cause came on this day to be heard on motion by plaintiffs for a preliminary injunction, Messrs. Snyder, Gale & Richards appearing on behalf of the plaintiffs in support of said motion, Hon. Clifford L. Hilton, Attorney of Minnesota, G. A. Youngquist, Asst. Atty. Gen. of Minnesota and Patrick J. Ryan, appearing on behalf of defendants in opposition thereto; whereupon, it is by the Court

Ordered; That said motion be set for hearing before the Court at St. Paul, on April 7, 1924, at ten o'clock in the morning, and that

the temporary restraining order issued on January 7, 1924, be continued in force until the hearing and determination of said motion for preliminary injunction, and until the further order of the Court, and that an order be drawn in accordance herewith.

A true record. Attest:

Joel M. Dickey, Clerk, by E. Catherine Neff, Deputy.

[File endorsement omitted.]

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONTINUING RESTRAINING ORDER—Filed Jan. 12, 1924

The above entitled matter having come duly before the court at a session thereof, held in the Federal Building in the City of Duluth in the State of Minnesota on Saturday the 12th day of January 1924 at 10:00 o'clock in the forenoon, upon the order to show cause hitherto issued therein, why the preliminary injunction in plaintiffs' bill of complaint prayed should not issue; and plaintiffs above named duly appearing by one of their solicitors, Edward C. Gale, Esq., and the defendants above named, except the Sargent Land Company, duly appearing by Clifford L. Hilton, Esq., as Attorney General of Minnesota and G. A. Youngquist, Esq. Assistant Attorney General, there being no appearance for said defendant Sargent Land Company; and all parties being heard on such motion and a *and a* stipulation being duly entered into in open court that the trial of said action should be set for April 7th, 1924, in the City of St. Paul in said State or as soon thereafter as counsel can be heard;

Now therefore, it is hereby ordered that the temporary restraining order hitherto issued in the above entitled proceeding under date of January 7th, 1924, be and the same hereby is continued in full force and effect and binding and obligatory upon said defendants and each of them as therein set forth, to and until the final determination of said action or until the further order of the court herein; except that said Sargent Land Company may, if it shall be so advised, make and file with the said Minnesota Tax Commission on or [fol. 72] before the 1st day of February, 1924 its verified report setting forth the amount of royalty received by said defendant during the preceding calendar year as required by Section 3 of said Chapter 226 of the Laws of 1923 of the State of Minnesota and except that defendants Samuel Lord, James G. Armson and Odin Halden as constituting the Minnesota Tax Commission may so receive and file such report.

Dated at Duluth, Minnesota, January 12, 1924.

Wm. A. Cant, Judge.

[File endorsement omitted.]

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—Filed April 7, 1924

It is hereby stipulated and agreed by and between the respective parties to the above entitled action that, for the purpose of the trial of said action and subject to objections as to their relevancy and materiality, the following facts may stand as admitted; that any party may, however, introduce evidence in the regular manner upon the trial of said action relative to any matters properly within the issues covered by the pleadings and not controverting the facts herein stipulated. Subject to such understanding, it is agreed as follows:

(1) Plaintiff Helen P. Bardwell is and for many years last past has been a resident and citizen of the State of Massachusetts, and each of the plaintiffs, Harriot P. Ayer and Alice P. Forman, for many years last past has been and now is a resident and a citizen of the State of California.

[fol. 74] (2) Defendant Sargent Land Company, is a corporation of the State of Minnesota, having its principal office and place of business in the City of Minneapolis in said state; defendant has a capital stock of two thousand one hundred sixty (2,160) shares, and each of the plaintiffs for a long time has been, and now is, the owner and holder of a large number of said shares.

(3 The matter in dispute in this suit exceeds, exclusive of interests and costs, the sum of three thousand dollars ($3,000.00).

(4) Said Sargent Land Company was organized for the primary purposes of receiving and uniting in one ownership the title to certain lands in the State of Minnesota, until then held by its numerous stockholders in individual ownership in undivided fractional shares, some of which were extremely small, in proportion to their respective ownership interests in said lands, and its original Articles of Incorporation, executed and filed in the office of the Secretary of State of Minnesota in the year 1906, stated the general nature of the business of the corporation to be as follows: "The general nature of its business shall be the buying, owning, exploring and developing, leasing, mining, selling and dealing in lands, tenements and hereditaments, and the doing of all things necessary or incidental to the things above specified."

In the year 1909 the Articles of Incorporation of said company were amended so as to state and provide, and the same do now state and provide, that the general purposes of said corporation shall be "to unite in one ownership the undivided fractional interests of its various stockholders in lands, tenements and hereditaments, and to own such property, and, for the convenience of its stockholders, to receive and distribute among them the proceeds of any disposition of such property, at such times, in such amounts, and in such man-

ner as the Board of Directors may determine." Said corporation has no purpose or purposes other than those so specified and limited in [fol. 75] its said Articles of Incorporation, and it has at all times held all of its unliquidated corporate property for such purposes, and for no other purpose. Under its said Articles of Incorporation said company, since the year 1909, has not been, and is not, authorized to open, develop or operate mines upon its said lands, or any of them, or elsewhere, and it has never opened, developed or operated any mine or mines, and has never been engaged and is not now engaged in any business or occupation, except as set forth in its Articles of Incorporation, as above quoted.

(5) After the organization of said Sargent Land Company, the title to the lands owned by its numerous stockholders, as aforesaid, was duly conveyed to the corporation by the various owners thereof, and, by virtue thereof, said Sargent Land Company became the owner in fee of numerous tracts and parcels of land in the State of Minnesota of large value. The consideration paid by said company for the conveyance to it of said lands was the issuance and delivery to said various individual owners of its capital stock, in proportion to their respective interests in said lands. Said lands represented, in the ownership of said individuals so conveying the same, and in the ownership of said Sargent Land Company, a large value. At the time of the conveyance of said lands to said corporation, the chief value thereof did and now does consist in deposits of iron ore. The only convenient and practical means of realizing upon such of the assets of said company as consist of mineral lands, and of effecting the purposes of its incorporation in relation thereto, were at all times since the conveyance of said lands to said company, and now are, the leasing of said mineral lands to be opened, developed, operated and mined by lessees, or selling and conveying the fee of said lands, or selling the iron ore contained therein, to be mined and removed by the vendees of the same.

[fol. 76] (6) The individual defendants in this suit are residents of the State of Minnesota, and Samuel Lord, James G. Armson and Odin Halden constitute the Minnesota Tax Commission of said State; Clifford L. Hilton is the Attorney General of said State; Raymond P. Chase is the State Auditor of said State, and Henry Rines is the State Treasurer of said State, all as alleged in paragraph (3) of said complaint.

(7) During the year 1923 and prior thereto, said Sargent Land Company was the owner in fee of various tracts of land containing valuable deposits of iron ore, the chief value of which tracts consisted, and consists, in the ore deposits thereon. Certain of said tracts were not at any time during the year 1923, and are not now, leased or mined, and no ore has been sold therefrom, and no royalties have been received on account of the mining or removal of ore therefrom during the year 1923, or at any time; but during the said year 1923, and prior years, said tracts of land were taxed, ad valorem, as mineral lands, and the taxes thereon for said years have been or will be paid in due course.

(8) Four of the tracts of land owned by said company, on which deposits of iron ore exist, were leased to certain lessees during portions of said year 1923, and prior thereto, under and by virtue of four separate mining leases, all in substantially the same form as exhibit "1" attached to the bill of complaint in this suit, the descriptions of the particular tracts, and the amounts of royalty payable under said leases varying to conform to the facts in each case.

(9) During the year 1923 said Sargent Land Company derived from royalties payable under said leases, either by way of royalties paid to it in advance of the mining and shipment of ore from said land, or by way of royalties paid to it for ore actually mined and shipped therefrom, large amounts of money; and said company will [fol. 77] continue to receive considerable amounts of money from and on account of said royalty payments while said mining leases or any of them remain in force. Two of said mining leases were, however, duly canceled, surrendered and terminated during the year 1923, in accordance with the express provisions thereof, and no royalties have since been or will hereafter be received by said company under either of said leases. On or about the 5th day of September, 1923, said company sold and conveyed the fee of the land described and included in another of said mining leases, together with all the right, title and interest of said company therein, for a consideration in money paid by the purchaser of said land; said land was so sold outright by said company, which has no further right, title or interest therein, and the mining lease covering the same was canceled and surrendered.

(10) Of the moneys received by said Sargent Land Company as royalties in the year 1923, the sum of $9,559.32 was paid on account of ore actually mined and removed from leased lands of said company in the year 1922, and the sum of $450.00 was received by said company in the year 1923, on account of advance royalty for the year 1922 due and payable October 25, 1922, but not in fact paid until the year 1923.

(11) Said Sargent Land Company, prior to the year 1923, with reference to one of its said tracts of mineral lands, entered into a certain agreement of which exhibit "2" attached to the bill of complaint herein is a true copy, and said Sargent Land Company received from payments made to it in the year 1923, under the provisions of said agreement, a substantial amount of money, a portion of which, however, was for and on account of iron ore mined and removed from said land during the year 1922.

(12) At all times since its organization said Sargent Land Company has maintained an office for the purpose of conducting its [fol. 78] corporate affairs, for the maintenance of which, and the proper inspection of its properties and the operations conducted upon its mineral lands, said company is subjected to a considerable expense, which has been and will be paid wholly, or in large part, out of the receipts of said company from royalties derived under such mining leases, and under said agreement, exhibit "2". Said items

of expense, together with taxes and other miscellaneous items, are paid, or provided for, by said company out of the moneys received from the leasing and/or sale of its property and before any distribution of such moneys is made to its stockholders, and the distributive interests of said stockholders in such moneys are diminished to the extent of all such prior payments.

(13) In pursuance of the purpose of the corporation, it has been the practice of the Sargent Land Company, from time to time, as it receives moneys from the sale and/or leasing of its property, to distribute the same to its stockholders in proportion to their respective holdings of the capital stock of the company; and the respective distributive interests of said stockholders in all of the receipts of the corporation are diminished only by the amounts retained by the corporation for the purpose of meeting the necessary operating expenses of the corporation, including taxes and other charges lawfully imposed upon it, and the property owned by it.

(14) The legislature of the State of Minnesota, at its session of 1923, enacted Chapter 226 of the Laws of Minnesota for said year, entitled "An Act providing for the levy and collection of a tax on royalties received by the owner of any right, title or interest in land situated in this state, for permission to explore, mine, take out and remove, ore from the same," which act was approved by the Governor of said state April 11, 1923, a true copy of which act [fol. 79] is set out in exhibit "3" attached to the bill of complaint in this suit.

(15) At the time of the enactment of said Chapter 226 of the laws of 1923, and prior thereto since the organization of the corporation, the mineral bearing lands of said Sargent Land Company had a large value, and constituted the principal assets of said company, and as such represented, in large part, its invested capital, and gave to the shares of stock of said company their chief value; and the annual ad valorem taxes imposed upon real property under the laws of Minnesota have been at all times, and still are, assessed upon said lands, and all of the iron ore in place therein; and the valuation of all of said tracts of land for purposes of taxation is based chiefly upon the value of said iron ore.

(16) The mineral bearing lands owned by said Sargent Land Company constitute a small portion of the mineral lands in private ownership in the State of Minnesota; a large part of said other lands is leased by the owners thereof to different lessees under contracts similar in their nature to exhibit "1" attached to the bill of complaint; and several tracts of said mineral lands, not exceeding ten (10) in number, are subject to contracts similar in form to exhibit "2" attached to said bill of complaint, and the owners of said lands are respectively in the same position as is said Sargent Land Company, and are similarly affected by the operation of said Chapter 226 of the Laws of 1923.

(17) In the year 1923 there were in Minnesota 124 mines in operation producing approximately 45,000,000 tons of ore.

There were during the year 1923 in Minnesota four instances in which fee owners operated their own properties and sold the ore produced without receiving or paying royalties thereon. In two of those instances the operation was largely a cleaning up process, [fol. 80] the mines being near exhaustion; the ore produced from these two properties amounting to approximately 92,000 tons. In the third instance the operator mined his fee owned property in connection with adjoining leased property, producing from the former 91,000 tons of ore and from the latter 111,000 tons of ore. In the fourth instance there remained at the beginning of 1923 about 250,000 tons of open pit ore, of which 128,000 tons were removed in 1923 and the remainder of which the owner intends to remove forthwith, and that there will then remain 3,200,000 tons of underground ore which the owner does not intend to mine for several years to come, but does intend to mine later.

(18) Many of the owners of mineral lands in the State of Minnesota, who have leased their lands to others to explore, mine take out and remove, ore from the same, are non-residents of the State of Minnesota, and the royalties paid to them under their said mining leases are transmitted to them from Minnesota, or from points outside of Minnesota, and are received by them outside of the State of Minnesota.

(19) (a) At a duly convened meeting of the Board of Directors of said Sargent Land Company, at which a quorum of said directors was present, the following resolution was duly presented and its adoption moved and seconded, but upon being put to vote the same was defeated, only two votes being recorded in the affirmative and the votes of the other directors present being recorded in the negative:

"Whereas, Chapter 226 of the laws of Minnesota for 1923 purports to impose a tax upon all royalty received during each calendar year for permission to explore, mine, take out and remove ore from land in this State, beginning with the year 1923 said tax to be at the rate of six percentum (6%) per annum; and requires every person to whom royalty is paid to make and file with the Minnesota Tax Commission on or before the first day of February, 1924 (for royalty receipts during the year 1923), and annually thereafter on or before said day, a duly verified report setting forth [fol. 81] the amount of royalty received, and such other information as may be required by said Commission; and

"Whereas, said act contains other provisions relating to the determination of the correct amount of such royalty receipts and the mode of levying and enforcing payment of said tax thereon; and

"Whereas, said act is believed to be unconstitutional and void, as not being uniform upon the same class of subjects, as depriving citizens of this State of the equal protection of the laws, as taking private property for public use without just compensation, and

as depriving persons subject to said tax of their property without due process of law;

"Resolved, that this corporation refuse to make and file the report required by section 3 of said act, and refuse to pay any tax that may be imposed or attempted to be imposed upon it under any provision of said act.

"Resolved, further, that the officers of this corporation be and they are hereby instructed forthwith to take such action as may be approved and advised by its counsel to restrain the public officers charged in said Act with the duties of carrying out and enforcing the provisions thereof from so doing, and to prosecute such action or actions as may be necessary to determine the validity of said act in the Court of last resort."

(b) Thereupon, upon motion duly made and seconded the following resolution was adopted by a majority vote of the directors present:

"Resolved, that the proper officers of this corporation be and they are hereby instructed to make and file with the Minnesota Tax Commission the duly verified report of this corporation setting forth the amount of royalty received by it, during the calendar year 1923, for permission to explore, mine, take out and remove ore from lands in this State owned by this corporation, or from any interests in any such lands owned by this corporation, together with such other information as said Commission may require; and in all things to comply with all the provisions of Chapter 226 of the laws of Minnesota for 1923 obligatory upon this corporation as a receiver of such royalties."

(c) Pursuant to said last named motion, the officers of said company did make and file, on or before the first day of February, 1924, the report of royalty receipts for the year 1923 required by said Chapter 226 of the Laws of 1923, and a majority of the directors of said company, and the officers thereof, threaten to and will, [fol. 82] out of the treasury of said company unless restrained therefrom in this suit, pay the tax upon the royalties received by said company during the year 1923, in accordance with the requirements of said Chapter 226.

(20) The defendants Samuel Lord, James C. Armson and Odin Halden, acting as the Minnesota Tax Commission, threaten to and will, unless restrained by this Court, proceed to fix the amount of the tax payable by said Sargent Land Company as such amount may be determined by them on account of royalties received by said company during the year 1923; and said defendants will include, as a portion of the royalties so taxable under the provisions of said Chapter 226, the moneys paid to said company under and by virtue of payments made in said year 1923 under the provisions of said agreement, exhibit "2". And said defendants threaten to and will, unless restrained in this suit from so doing, levy such taxes and certify the same to the defendant Chase as State Auditor; and said Chase threatens to and will, unless restrained in this suit from so doing, make his draft upon said company for the amount so certi-

fied, and place the same in the hands of defendant Rines, as State Treasurer, for collection. Said defendant Rines, as State Treasurer, threatens to, and will, unless restrained from so doing in this suit, attempt to collect the amount of said draft, and will, upon the failure or refusal of said company to pay the same, deliver said draft to the defendant Hilton, as Attorney General of the State of Minnesota, as required by section 10 of said Chapter 226, and said Hilton threatens to, and will, unless restrained in this suit from so doing, bring action thereon against said company for the amount of said draft, together with interest, penalties and costs.

(21) In case said Sargent Land Company shall pay any tax levied and required to be paid by it, in accordance with the provisions of said Chapter 226, the amount so paid cannot be recovered by said [fol. 83] corporation under any existing statute of the State of Minnesota, even if thereafter said Chapter 226 should be held to be null and void, as violating the provisions of the Constitution of the State of Minnesota, and/or the Constitution of the United States.

(22) Sections 1972, 1973, 1974 and 1975 of the General Statutes of Minnesota for 1913 are laws of the State of Minnesota, as set out in exhibit "4" attached to the bill of complaint in this suit, and section 1988 as amended by Chapter 140 of the Laws of 1923, and section 2316, as amended by Chapter 102 of the Laws of 1923, are laws of the State of Minnesota, and are correctly set out in said exhibit "4" attached to said bill of complaint.

(23) The moneys accruing to said Sargent Land Company during the year 1923, under and by virtue of its said mining leases and of said agreement exhibit "2" attached to the bill of complaint, were paid to and received by it at the City of Minneapolis, Minnesota.

John R. Van Derlip, Fred B. Snyder, Edward C. Gale, Solicitors for Plaintiffs. Leo. P. McNally, Solicitor for Sargent Land Company. Clifford L. Hilton, Attorney General of the State of Minnesota; G. A. Youngquist, Asst. to Attorney General; Patrick J. Ryan, Solicitor- for Defendants.

Dated April 4, 1924.

[fol. 84] [File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

MEMORANDUM DECISION IN THE CASE OF ROYAL MINERAL ASSOCIATION VS. LORD—Filed Jan. 10, 1925

During the year 1921, the Legislature of the State of Minnesota enacted Chapter 223 of the laws of that year. This Act provided for the levy of a tax payable annually and amounting to six per cent of the valuation of all ore mined or produced within the State

during the calendar year. Under the Act, such valuation is ascertained by making certain deductions from the value of such ore at the place where the same is brought to the surface of the earth. Among such deductions is: "4. The amount of royalties paid on the ore mined or produced during the year." This is an occupation tax. Oliver Iron Mining Co. vs. Lord et al., 262 U. S. 172. It is collectible by suit against the person from whom the same is due the same as other demands are enforceable.

During the year 1923, the legislature of that State enacted Chapter 226 of the laws of that year. This Act provides that "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine and take out and remove ore from land in this State, a tax of six (6) per cent." By Section 8 of the Act, this tax is made a specific lien on the interest of the person from whom the tax shall be due, in and to the land on account of which the royalties are paid. Provision is also made for collection of the amount due by suit and by a sale thereunder of the interest in such land held by the person from whom the tax shall be due.

Various persons and corporations who are in receipt of royalty from ore lands in said State urge that the tax imposed under Chapter 226, supra, is in violation of certain provisions of the Constitution of the State of Minnesota, and of certain other provisions of the Constitution of the United States, and they have brought a number of actions, of which this is one, to enjoin the enforcement of the tax. In a large way, the question is whether the Act runs counter to any of the constitutional provisions which have been invoked.

The important provision of the State constitution which is involved, is that "Taxes shall be uniform upon the same class of subjects." Article 9, Section 1.

The important provisions of the Constitution of the United States which are involved are found in that part of the Fourteenth Amendment, which reads: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Other constitutional provisions have been discussed on the argument and in the briefs. Without overlooking or minimizing the force of any of them, it may be said that they are either involved in a discussion of the specific provisions above set forth, or they yield to the argument which may be made against them. It is urged, for example, that the Act violates that provision of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts." Article 1, Section 10. Giving the argument in that behalf due weight and consideration, it does not appear that the provision referred to is [fol. 86] applicable here. The laws as to taxation and the amount of the levy in any particular year are subject to constant change. All contracts are made subject to the right and the power of the State to make such modification in the laws with respect to future taxation as may seem necessary. Contracting parties may not in

effect agree that the State shall not modify its revenue laws, or shall not either increase or diminish the burden of taxation. If the enactment in question is otherwise valid, it will stand as against this objection.

Speaking generally, unless the Act in question is invalid as against the uniformity clause of the State Constitution, with reference to taxation, above quoted, or as against the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, above quoted, it must stand. These provisions and the discussion thereunder are closely related in a case of this kind. The matter may be reduced to still lower terms. The question is whether this court should hold that the classification, royalties, adopted by the legislature of the State of Minnesota, as a basis of taxation, or for the computation of the tax under Chapter 226, Laws of Minnesota, 1923, is invalid, and that the tax levied pursuant thereto is void.

1. The following rules are specially applicable to the uniformity clause of the State Constitution:

(a) Where that clause is invoked in advance of a decision by the Supreme Court of the State, holding a state law to be in violation thereof, Federal Courts will not so declare, unless such holding shall be imperatively necessary. If there has been no decision by the Supreme Court of the State, the Federal Court will seek to anticipate what the holding of the State Court would be, and will decide accordingly.

Louisville & Nashville R. R. Co. vs. Garrett et al, 231 U. S. 298, 305;
Pelton vs. National Bank, 101, U. S. 143, 144;
Pullman vs. Knott, 235 U. S. 23, 27;
Michigan Central R. R. Co. vs. Powers, 201 U. S. 245, 291;
Coulter vs. Louisville & Nashville R. R. Co. 196 U. S. 599, 609.

(b) The two cases last above referred to clearly indicate that the Federal Courts are especially loth to interfere where the Act in question involves the revenues of the State.

(c) The Supreme Court of the State of Minnesota has not passed upon the validity of the Act in question.

(d) The holdings of the Supreme Court of the State of Minnesota, as respects classification for the purpose of taxation, are that the legislature has a very wide range of discretionary power. Mutual Benefit Insurance Co. vs. County of Martin, 104 Minn. 179, 181. State vs. Royal Mineral Ass'n. 132 Minn. 232, 235. There are well recognized limitations to this power which serve as guides in the exercise thereof. "The classification must be reasonable, and such as is suggested by essential differences of nature, situation, or circumstances, or by characteristics which make it desirable on grounds of public policy to apply to the members of the class a particular

method of taxation, and impracticable to apply thereto the ordinary [fol. 87] methods of taxation."

Mutual Benefit Insurance Co. vs. County of Martin, 104 Minn. 179, 181, 182;
State ex rel. St. Paul City Ry. Co. vs. Minnesota Tax Commission, 128 Minn. 384.

2. The following rules are applicable to cases where the due process clause or the equal protection clause of the Fourteenth Amendment is invoked, or where one or both of those clauses and the uniformity clause of the State Constitution are involved.

(a) Under all the authorities the classification must be a reasonable one and such as essential differences suggest.

State ex rel vs. Minnesota Tax Commission, 128 Minn. 384;
Gulf Colorado & S. F. Ry. Co. vs. Ellis, 156 U. S. 150, 155;
Southern Ry. Co. vs. Greene, 216 U. S. 400, 417.

(b) The decided policy of the Supreme Court of the United States when the foregoing clauses are invoked, is to announce and enforce the rule allowing State legislatures a wide discretionary power with respect to classification for purposes of taxation. Bell's Gap Ry. R. Co. vs. Penn. 134 U. S. 232.

"Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney as Admr. vs. Comptroller, etc. 222 U. S. 525, 536. The State is not bound by any rigid equality." Citizens' Tel. Co. vs. Fuller, 229 U. S. 322, 331."

"Any classification is permissible which has a reasonable relation to some permitted end of Governmental action. It is not necessary * * * that the basis of the classification must be deducible from the nature of the things classified * * *. It is enough, for instance, if the classification is reasonably founded in 'the purpose and policy of taxation."

Watson vs. State Comptroller, 254 U. S. 122, 124, 125;
Heisler vs. Thomas Colliery Co. 260 U. S. 245, 255.

"Passing on that amendment (the 14th) we have repeatedly decided * * * that it does not take from the States the power of classification, and also that such classification need not be either logically appropriate or scientifically accurate. * * * A wide range of discretion, therefore, is necessary in legislation to make it practical." District of Columbia vs. Brooke, 214 U. S. 138, 150.

There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment. Middleton vs. Texas Power & Light Co., 249 U. S. 152, 157."

[fol. 88] Without extended discussion, the same view is taken in National Paper & Type Co. vs. Frank K. Bowers, Collector, U. S. Supreme Court, Dec. 15, 1924.

The equal protection clause of the Fourteenth Amendment does not prohibit double taxation by the States.

Shaffer vs. Carter, 252 U. S. 37, 58;
Cream of Wheat Co. vs. Grand Forks, 253 U. S. 325, 330.

(c) The limitation upon this power of classification is that "It must not be exercised in clear and hostile discrimination between particular persons and classes."

Citizens' Tel. Co. vs. Fuller, 229 U. S. 322, 331;
Heisler vs. Thomas Colliery Co. 260 U. S. 245, 255;
Bell's Gap R. R. Co. vs. Penn. 134 U. S. 232, 237."

(d) In Dawson vs. Kentucky Distilleries Co. 255 U. S. 288:

(1) The Court was dealing with a nondescript imposition from the beginning.

(2) The basis of the alleged classification and tax was elusive, shifty and unsatisfactory. It was not uniform on property of essentially the same class.

(3) The Act "Imposed upon every person engaged in the business of manufacturing whisky, or in the business of owning and storing the same in bonded warehouses within the State, what was called an 'annual license tax' of fifty cents a gallon upon all whisky either withdrawn from bond or transferred in bond from Kentucky to a point outside the state."

(4) Though called an annual license tax in the Act, the imposition was held to be a tax on the property.

(5) On the argument it was conceded by the authorities seeking to uphold the tax, that if it was a tax on property, the same was void.

(6) In view of the concession so made, the question of classification was not given extended discussion by the Court.

3. Various facts bearing upon the propriety and justice of the classification here involved must be considered.

The iron deposits constitute a very substantial part of the easily available great natural wealth of the State of Minnesota. Development and operation of iron mines, a highly necessary and important industry, means at the same time the exhaustion of that wealth. Such exhaustion attends also the removal of the products of stone quarries and of gravel beds and the cutting and removal of certain kinds of timber. Generally, the development and successful prosecution of any enterprise increases the taxable wealth of the State. In large part, the products of quarries, gravel beds and forests remain within the State in some form serve as the basis of taxation therein. With respect to iron ore, however, practically all that is mined is being transported beyond the limits of the State. Great natural wealth which serves as the basis of taxation is annually [fol. 89] being withdrawn therefrom. Of necessity the revenues of the State will be substantially affected thereby.

4. Without doubt, when the Legislature of 1923, met and considered problems of taxation, it knew of Chapter 223, Laws of 1921. State vs. Klasen, 123 Minn. 382. That Act was presumably valid. On its face it pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of six per cent. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The legislature found this latter class already carved out by the earlier Act. In 1923, the general purpose apparently was to assure the State a return of a full six per cent, less certain minor deductions, on the value of all ore mined and brought to the surface of the earth. And the further general purpose apparently was to adjust this burden equitably as between the two classes of interests concerned in the operation where the mine was being operated by a lessee. One of these classes, represented by the operator, was specified in Chapter 223, supra, and the tax burden by that Act was imposed thereon. The other interest, represented by those receiving royalties was specified in Chapter 226, Laws of 1923, and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter. In the consideration of this case, it is neither possible, nor proper to divorce entirely the two acts which have been referred to. Either separately, or together, they indicate the policy of the State with reference to the taxation of the interests therein specified.

5. The Federal Constitution does not require that the two classes above referred to should have been covered by the same enactment, or that the two together should have exhausted the subject and covered the entire field. "The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment." Supra.

6. The basis of classification which may be invoked in support of Chapter 226, is the circumstance or condition that, of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration. The desire of the legislature was to reach the interests involved in property of that class and apply thereto a special tax. If such lands may properly be placed in a class by themselves, the rest is a matter of identifying the interests therein for the purpose of taxation. This latter may be called classification of such interests, but it is little more than identification thereof—a pointing out and specifying of the particular interests sought to be taxed.

7. We are concerned to learn whether there was reasonable ground for this classification, and whether under the provisions of the Act, [fol. 90] all within the class involved in Chapter 226, may be treated alike. The burden is on the plaintiff to answer one or both of these questions clearly in the negative. If there has been no "clear and

hostile discrimination between particular persons and classes," the law should stand.

Having in mind the real basis for the classification adopted, the fact that other mining properties, not in process of being wasted or depleted, are not included under the provisions of the Act, is not important. This is true whether they are being sold and transferred from time to time, like other property, or are not. With the lapse of time, as such properties come within the class contemplated, the Act will apply. In time, presumably, all ore-bearing properties of substantial value in the State will become subject to the provisions of the law in question.

Chapter 226 is not invalid, because it may be subject to technical criticism, or will not work with perfect nicety of detail, or because conditions may be thought of which would seem to involve differences and inequalities.

"The difference, however, is one such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases and cannot be regarded as an unfriendly or unreasonable discrimination."

Shaffer vs. Carter, 252 U. S. 37, 57.

In Oliver Iron Mining Co. vs. Lord, et al., 262 U. S. 172, 181, the Court says: "It is also said that the royalty provision and others respecting taxes will work a discrimination as between lessees in that some will be subjected to a higher tax than others. No doubt, there will be differences in the amount, but they will result from differences in situation and not from differences in treatment. Some lessees pay higher royalties than others and will secure a higher deduction on that score. * * * In short, the tax is to be adjusted to the value of the output, less the major expenses of the business, and this according to uniform rules. We, therefore, cannot say that it is intended to, or will work any arbitrary or unreasonable discrimination as between different lessees."

The circumstance that during the year 1923, plaintiff may have been assessed under the head of "Money and credits," on account of funds then on hand and received as royalties during that year, falls within the foregoing observations and authorities.

The fact that other wasting properties, such as stone quarries, or gravel beds, or certain timber areas are not included in the Act here under consideration, does not invalidate the classification. They might have been included, but the differences and distinctions between them and that which was included, justifies their omission. The differences upon which to base a classification "Need not be great or conspicuous." Supra. Anthracite coal may be classified separately from bituminous coal. Meat packing may be classified separately from the packing of other food products. A special tax may be imposed on dealers in certain specified articles, while dealers in other articles go free.

Heisler vs. Thomas Colliery Co. 260 U. S. 245;
Armour Packing Co. vs. Lacy, 200 U. S. 226;
Southwestern Oil Co. vs. Texas, 217 U. S. 114, 121.

[fol. 91] 8. The legislature has made the classification. First, in a class by themselves, are the ore lands which are in process of being mined, and, therefore, depleted, and which within a comparatively brief time will be lost to the State as a source of revenue. This clearly distinguishes these lands from other lands in general and from other ore lands in particular. The distinction is based on grounds which have a legitimate relation to the question of taxation. Facing the depletion of certain lands and the loss of their value, the State might be justified in imposing a heavier tax thereon during the intervening time, knowing that when that time should elapse there could be no further substantial tax at all. There is no apparent difficulty in making the classification or in according uniformity of treatment in connection therewith.

9. Next is the identification of the separate interests here involved for purposes of taxation, or the classification thereof. As already indicated, as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator who does the mining, and the owner whose ore is being mined, and the respective interest of each. The interests of an intervening lessee are identified with those of the owner for the purposes here in mind. Although together, the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. So great is that difference that one class, or set of interests may be taxed without the other, as was done by the Act of 1921, and doubtless, different rates of taxation may be imposed, and, as will be seen, different forms of tax may be levied thereon. There is no practical difficulty in recognizing these two classes as separate and distinct for purposes of taxation, and in according uniformity of treatment to all within each class. It is a matter largely of specifying interests, very different in character, which it is sought to reach for purposes of taxation. One is dealt with in the Act of 1921. The right to select that interest as the basis for the imposition of a separate tax is recognized in Oliver Iron Mining Co vs. Lord et al., supra. Although the tax under the Act of 1921, is an occupation tax, the same is levied because of the operator's relation to the land, and in the last analysis, because of his interest therein. By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases where there is but one ownership, the tax is imposed under the Act of 1921.

10. In a case where it is clearly made out that a law is unconstitutional, the Court should not hesitate to so declare. If such proof shall not be made, or if the matter is left in doubt, the law should stand. Invoking now and applying some of the basic rules hereinbefore set forth,—this Court must be slow to hold a State law invalid; under the evidence here, such a holding is not "imperatively necessary;" in enacting the particular law here involved, the State legislature had "a very wide range of discretionary power;" the classification adopted by the legislature "is a reasonable one and such as essential differences suggest;" such classification does not indicate any "clear and hostile discrimination between particular

[fol. 92] persons and classes;" it cannot be said that the classification adopted was not "suggested by * * * characteristics which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, and impracticable to apply thereto the ordinary methods of taxation." It is not clearly shown that Chapter 226, supra, is in violation of either the State or the Federal constitution. The Act, therefore, should be held valid. The justice or injustice of the tax, and the question of where it should ultimately fall, and by whom ultimately it should be paid, are not for determination here and no comment is made thereon.

11. In a sense it may be said that the two taxes herein referred to are together imposed upon the mining operation as a whole, as the same affects any particular description of land. Undoubtedly, the Legislature of 1923, had something like this in mind. This would not require that the two taxes should be of the same kind. The character of the tax depends upon the legislative intent as expressed in the law. Under either Act, the tax might have been laid as an occupation tax, or as an income tax, or as a tax on the land, as might at the same time be applicable and valid and best give effect to the legislative will. Under the Act of 1921, the convenient and practicable form to employ was that of an occupation tax. Taken literally, the Act of 1923, provides for a tax on royalties. Certain non-residents of the State of Minnesota, urge that as to them, the situs of the royalty is never within the jurisdiction of that State, and, therefore, that the royalty cannot be taxed therein. Shaffer vs. Carter, 252 U. S. 37, 55, is opposed to this view and as against the objection referred to, if the Act were construed as providing for a direct tax on royalties, it would stand. Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax.

Pollock vs. Farmers' Loan & Trust Co. 157 U. S. 429, 581.

12. The question of what royalty receipts shall be included in the computation of the tax for the year 1923, is not decided. It is assumed that in the administration of the law, the Act in question will be so construed as not to offend against any constitutional provision.

From the foregoing, if correct, it follows that the relief prayed for should be denied.

Let decree in the above entitled suit be prepared in accordance herewith, and let such decree provide that the temporary restraining order in said suit heretofore issued be and remain in full force and effect for the period of sixth days after the entry of such decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge of United States District Court.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION—Jan. 15, 1925

The memorandum filed herewith in the case of Royal Mineral Association, et al. v. Samuel Lord, et al. is adopted and made a part of this case.

In addition, while technically the contract of the Sargent Land Company, on its face, may be one of sale, and amounts payable from time to time thereunder may be deferred installments of what is called the purchase price, yet, having in mind the purpose and object of Chapter 226, Laws of Minnesota, 1923, there is, in substance, no real distinction which can be drawn between the contract and the ordinary so-called mining lease. Both accomplish the same purpose in much the same way, and it would not do to hold that the tax under the law applies in one case and does not apply in the other.

Let decree in the above entitled suit be prepared in accordance therewith, and let such decree provide that the temporary restraining order in said suit heretofore issued be and remain in full force and effect for the period of sixty days after the entry of such decree, for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge United States District Court.

[fol. 94] [File endorsement omitted.]

[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed Jan. 15, 1925

This cause came duly on to be heard, and was argued by counsel, and, upon consideration, thereof, it is ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed, with costs to the defendants to be taxed.

It is further ordered that the temporary restraining order heretofore issued in this suit be and remain in full force and effect for the period of sixty days after the entry of this decree for the purpose of allowing an appeal to be taken therefrom.

Dated January 15, 1925.

Wm. A. Cant, Judge United States District Court.

[File endorsement omitted.]

[fol. 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 11, 1925

Now come Helen P. Bardwell, Harriot P. Ayer and Alice P. Forsman, plaintiffs herein, by their counsel, and feeling themselves aggrieved by the final decree made and entered in the above entitled cause on the 15th day of January, 1925, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herewith. And they pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States. And your petitioners further pray that the court do order that the temporary restraining order heretofore issued in this suit be and remain in full force and effect pending the appeal herein and until the final determination of this cause.

John R. Van Derlip, Fred B. Snyder, Edward C. Gale, Solicitors for Plaintiffs and Appellants Helen P. Bardwell, Harriot P. Ayer, and Alice P. Forsman. John G. Milburn, 54 Wall Street, New York City, N. Y., of Counsel.

Dated March 10, 1925.

[fol. 97] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—March 11, 1925

The foregoing petition is granted and the plaintiffs' appeal allowed; and, the plaintiffs having given bond as required by this court, it is ordered that the temporary restraining order heretofore issued in this suit be and remain in full force and effect pending said appeal and until the final determination of this cause.

Wm. A. Cant, Judge of the United States District Court.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

(1) The court erred in holding that Chapter 226 of the laws of Minnesota for 1923 does not violate section 1 of Article 9 of the Constitution of Minnesota, requiring that taxes shall be uniform upon the same class of subjects.

(2) The court erred in holding that said Chapter 226 does not violate sections 33 and 34 of Article 4 of the Constitution of Minnesota, prohibiting special legislation.

(3) The court erred in holding that said Chapter 226 does not violate section 7 of Article 1 of the Constitution of Minnesota, providing that no person shall be deprived of property without due process of law.

(4) The court erred in holding that said Chapter 226 does not violate section 13 of Article 1 of the Constitution of Minnesota, providing that private property shall not be taken for public use without just compensation.

(5) The court erred in holding that said Chapter 226 does not violate the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the State of Minnesota the equal protection of the laws.

(6) The court erred in holding that said Chapter 226 is not in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, that no state shall deprive any person of propery without due process of law.

[fol. 99] (7) The court erred in holding that said Chapter 226 is a valid and enforcible law.

(8) The court erred in holding that the tax sought to be established by said Chapter 226 is lawful and enforcible.

(9) The court erred in holding that the tax imposed by said Chapter 226 upon "royalties" is a valid tax upon the interest in the land of the person or persons entitled to receive such royalties for permission to explore, mine, take out and remove ore from land in the State of Minnesota.

(10) The court erred in holding that the classification for taxation of such "royalties" separately from other rents derived from land in the State of Minnesota is reasonable and valid.

(11) The court erred in holding that the classification for taxation of such "royalties" separately from other moneys belonging to the taxpayer is reasonable or valid.

(12) The court erred in holding that said Chapter 226 is uniform in its tax imposition and burden upon the same class of subjects.

(13) The court erred in holding that the depletion of the value of mineral lands by removal of ores therefrom constitutes a lawful basis for discrimination against, or separate classification of, such property in respect of taxation.

(14) The court erred in holding that the depletion of the value of mineral lands by the removal of ores therefrom, constitutes a valid basis for the taxation of royalties paid or received for permission to explore, mine, take out and remove ore from such lands.

(15) The court erred in holding that the fact that practically all of the iron ore mined in Minnesota is transported beyond the limits of the State, constitutes a lawful basis for the separate classification for taxation of royalties paid or received for permission to explore, mine, take out and remove such ore from land in Minnesota, or for taxation of any interest in such land.

(16) The court erred in holding that instalments of purchase money received by a vendor for the sale of iron ore in place in lands in Minnesota are "royalties" within the purview of said Chapter 226, and taxable thereunder, even if said law be valid and enforcible as respects royalties paid and received for permission to explore, mine, take out and remove ore from land in Minnesota.

(17) The court erred in denying to the plaintiffs the relief sought by them in this action, and every part thereof, and in entering a decree dismissing the bill of complaint.

Respectfully submitted, John R. Van Derlip, Fred B. Snyder, Edward C. Gale, Solicitors for Plaintiffs Above Named, Minneapolis, Minnesota. John G. Milburn, Counsel, 54 Wall Street, New York City, N. Y.

Dated March 10, 1925.

[fol. 100] [File endorsement omitted.]

[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE APPEAL—Filed April 27, 1925

Whereas, the above entitled action has been brought by plaintiffs above named for the primary purpose of determining the constitutional validity of Chapter 226 of the Laws of Minnesota for 1923 and is now pending in the Supreme Court of the United States on appeal from the decree entered in said case adverse to plaintiffs, and

Whereas, certain other persons, to-wit: James E. Sherman, Alton T. Roberts, J. M. Richardson Lyeth, Carroll Paul, and Frederick P. Burrall, as Trustees under the will of John M. Longyear deceased; and Mary B. Longyear, as plaintiffs, have brought suit against Samuel Lord, James G. Armson and Odin Halden, as constituting the Minnesota Tax Commission; Clifford L. Hilton, as Attorney General of Minnesota; Raymond P. Chase, as State Auditor of Minnesota, and Henry Rines, as State Treasurer of Minnesota, defendants, for the same purpose of determining the constitutional validity of said Legislative Act, which said last named suit is now pending in the District Court of the United States, District of Minnesota, Fifth Division, and in which said suit plaintiffs and defendants are represented and appear by the same attorneys, respectively, as rep-

resent plaintiffs and defendants, respectively, in the above entitled action, and

[fol. 102] Whereas, a stipulation has been entered into in said suit brought by James E. Sherman and others consenting and stipulating that the trial of said last named suit shall be postponed until final judgment shall have been made and entered in said action brought by Helen P. Bardwell and others and that said judgment, when entered, shall be final and conclusive upon all parties in said suit brought by James E. Sherman and others as respects the constitutional validity of said Legislative Act as fully and with the same effect as if said judgment were rendered immediately in said last named suit;

Now therefore, it is hereby stipulated by and between the respective parties to the above entitled action that any and all issues raised by the pleadings in said suit brought by James E. Sherman and others may be argued and submitted to said United States Supreme Court upon appeal herein and particularly any and all issues arising from or based upon the fact that plaintiffs, and each of them, in said suit brought by James E. Sherman and others were and are non-residents of the State of Minnesota, and that this stipulation shall be included in and form a part of the transcript of record to be filed in said Court upon said appeal.

Dated April 23, 1925.

John R. Van Derlip, Fred B. Snyder, Edward C. Gale, Solicitors for Plaintiffs. L. R. McNally, Attorney and Solicitor for Sargent Land Co. Clifford L. Hilton, Attorney General; G. A. Youngquist, Attorney General; Patrick J. Ryan, Solicitors for Defendants Lord, Armson, Halden, Hilton, Chase and Rines. John G. Milburn, 54 Wall Street, New York City, N. Y., of Counsel.

[fols. 103-105] CITATION—In usual form showing service on Jno. O'Brien et al.; filed March 14, 1925; omitted in printing

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[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated, by and between the respective parties in the above entitled action, that the transcript of the record to be prepared and filed in the Supreme Court of the United States upon the appeal of the above named plaintiffs, Helen P. Bardwell, et al., shall contain the following:

(1) The bill of complaint including exhibits 1, 2, 3 and 4.
(2) The answer of the defendant Sargent Land Company.
(3) The answer of the defendants Samuel Lord, James G. Armson, Odin Halden, Clifford L. Hilton, Raymond P. Chase and Henry Rines.
(4) Restraining order, dated January 7th, 1924.
(5) Stipulation of parties continuing restraining orders in force, and waiving the procuring of interlocutory injunction, the hearing and determination of the suit by three judges, and that the suit may be heard and determined on its merits by Hon. William A. Cant.
(6) Order pursuant to preceding stipulation.
(7) Agreed statement of facts.
(8) Opinion of court and order for decree.
(9) Supplementary opinion and order in the above entitled action.
(10) Decree.
(11) Petition for appeal and order allowing same and continuing restraining order.
[fol. 107] (12) Plaintiffs' assignments of error.
(13) Citation.

That other stipulations and orders made in the action are not deemed essential for the proper hearing of this appeal.

Dated April 16, 1925.

John R. Van Derlip, Fred B. Snyder, Edward C. Gale, Attorneys and Solicitors for Plaintiffs. L. P. McNally, Attorney and Solicitor for Sargent Land Company. Clifford L. Hilton, Attorney General; G. A. Youngquist, Assistant Attorney General; Patrick J. Ryan, Solicitors for Defendants Lord, Armson, Halden, Hilton, Chase, and Rines.

[fol. 108] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 108 pages, numbered consecutively to 108, inclusive, is a true and complete transcript of all the records, process, pleadings, orders and final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court and in accordance with a stipulation for such transcript, a copy of which is included within said paging; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid and affixed the seal of said Court at Duluth, in the District of Minnesota, this 29th day of April, A. D. 1925.

Joel M. Dickey, Clerk, by E. Catherine Neff, Deputy. (Seal of the U. S. Dist. Court, Dist. of Minnesota, Fifth Division.)

Endorsed on cover: File No. 31,185. Minnesota D. C. U. S. Term No. 471. Helen P. Bardwell, Harriot P. Ayer, and Alice P. Forsman, appellants, vs. Sargent Land Company, Samuel Lord, James G. Armson, et al. Filed May 14, 1925. File No. 31,185.

NOV 16 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1925.

No. 336.

LAKE SUPERIOR CONSOLIDATED IRON MINES, OLIVER IRON MINING COMPANY, NORTHERN DEVELOPMENT COMPANY, *et al.*,
Appellants,

vs.

SAMUEL LORD, J. G. ARMSON, AND ODIN HALDEN, CONSTITUTING THE MINNESOTA TAX COMMISSION, *et al.*, ETC.,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLANTS.

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Supreme Court of the United States,

OCTOBER TERM, 1925.

No. 336.

LAKE SUPERIOR CONSOLIDATED IRON MINES, *et al.*,
Appellants,

vs.

SAMUEL LORD, *et al.*,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLANTS.

I.

Jurisdiction of the Court.

This is an appeal from a decree of the United States District Court for the District of Minnesota. The decree was entered January 15, 1925, and may be found at page 31 of the printed Record. The opinion of the lower court has not yet been published, but may be found on page 23 of the Record.

The decree dismissed a bill of complaint filed by appellants seeking to restrain the enforcement of the so-called iron ore royalty tax, being Chapter 226 of the Laws of Minnesota, for the year 1923, on the ground that the imposition of the tax violated the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of the State of Minnesota. It was conceded at the trial by counsel for the defendants that the

Court had equity jurisdiction (p. 22). Decrees were entered by the lower court dismissing the bills of complaint in this and the other suits on the ground that the statute was constitutional.

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as involving the construction or application of the Constitution of the United States, and as a case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. We believe the jurisdiction of the Court is sustained by the decision in *Oliver Iron Mining Company* v. *Lord*, 262 U. S. 172.

Although the jurisdiction of the District Court was based upon the question arising under the Federal Constitution, the court had jurisdiction to consider not only the question under the Federal Constitution, but all other questions properly presented by the Record, including the validity of the tax under the Constitution of the State of Minnesota.

Chicago Great Western Ry. Co. v. *Kendall*, 266 U. S. 94;
Greene v. *Louisville & I. R. Co.*, 244 U. S. 499;
Ohio Tax Cases, 232 U. S. 576.

II.

Statement of the Case.

The appellants, being the plaintiffs in the court below, are certain corporations that during the year 1923 derived income in the form of royalties from leases, sub-leases, and assignments of certain fee, leasehold and contract interests owned and held by them. Plaintiff Lake Superior Consolidated Iron Mines is a New Jersey corporation and plaintiff Northern Development Company is a West Virginia corporation. The other plaintiffs are Minnesota corporations. Each has been a corporation of the same state for more than thirteen years (Record, p. 1).

The facts in the case are not in dispute. They are embraced in (*a*) substantial portions of the amended bill of complaint expressly admitted in the answer (Record, pp. 1-10), (*b*) an agreed statement of facts (Record, pp. 15-18), (*c*) Evidence taken in court (Transcript of Evidence, Record, p. 18), and (*d*) a stipulation *re* facts (Record, p. 22).

The text of the Royalty Tax Statute is contained in Appendix A of this brief, and also as an appendix of the bill of complaint, on page 8 of the printed Record. Briefly stated, the statute imposes a tax of 6% upon "all royalty received * * * during the calendar year * * * for permission to explore, mine, take out and remove ore from land in this State." The statute requires persons to whom such royalty is paid to make certain reports to the Minnesota Tax Commission; provides for assessment of the tax, with severe penalties for non-payment; and provides that the tax shall be a lien, from the time it is due and payable, upon "all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid."

The admitted facts show that the defendants are threatening to enforce the iron ore royalty tax against the appellants, and have demanded that the appellants pay the taxes, and are threatening to assess the taxes against the plaintiffs and their respective property interests, and to certify the taxes and penalties in accordance with the provisions of the statute so as to cause them to become a lien upon the respective property interests of the plaintiffs, and to cause a cloud upon their respective titles. Defendants are also taking measures to require the appellants to file reports as required in the statute. The amount of taxes which the defendants are threatening to levy and collect from the appellants in this case, for the year 1923, would be upwards of $50,000, and for each of the years thereafter during the unexpired terms of the respective leases, a sum the amount of which cannot now be stated but which would in all events exceed $3,000 (pp. 2 and 12).

The Record establishes the following facts relating to the business of mining iron ore as conducted in the State of Minnesota:

All the known iron mines in Minnesota are in the northern and northeastern part of the state. The iron ore deposits constitute substantially the entire value of these lands. In 1923 there were 124 mines in operation, producing upwards of 45,000,000 tons of ore. In the majority of instances they were operated by lessees, but in four cases they were operated by fee owners. The lessees paid a total in royalties of upwards of $16,000,000, of which amount approximately $9,500,000 was reported as being received by resident owners, approximately $1,500,000 by foreign corporations, and considerably more than $5,000,000 by non-residents of the State.

At various times 243 iron mines have been in operation of which 45 have been exhausted. Of the mines operated in 1923, approximately one-half, which involved three-fourths of the tonnage mined, were mined by the open pit method (p. 17).

The total tonnage of merchantable ore in Minnesota is estimated at 1,300,000,000 tons. Of this 344,000,000 tons are held free from lease by various subsidiaries of one corporation. The present intention of said corporation and its subsidiaries is that these be mined by one of the subsidiaries, which is an operating company, without the payment of any royalty. During 1923 one mine was operated by such an arrangement.

During the last few years preceding 1923 there have been a number of instances in which iron ore properties not subject to lease have been sold outright and the fee transferred for a cash consideration, and a number of instances in which the fee of iron ore properties has been purchased by the lessee and the lease thereon cancelled. In 1923 there were at least two, and possibly more, instances in which fee owners of iron ore land which was not subject to lease sold the same for a cash consideration, or its equivalent, one of

which consisted in the purchase of an undivided one-sixteenth interest in fee by a company which already held a lease on the remaining fifteen-sixteenths interest. There was one instance in 1923 where an undivided eleven-thirty-seconds of the interest in fee was sold subject to an existing lease, the purchaser of said undivided fee interest and the lessee under said subsisting lease being companies having the same stockholders. There was another instance in 1923 of the sale of the fee interest, which is described in the agreed statement of facts in *Bardwell et al.* v. *Sargent Land Company et al.* tried herewith.

As bearing on the discriminatory nature of the tax here in question, the Record shows that several million yards or tons of gravel are taken from pits throughout the State each year by mining operations quite similar to the open pit methods of mining ore. A number of the most important gravel pits are operated on a royalty basis. Much of this gravel is used in making and keeping up roads and railroad rights of way and in building operations conducted within the State.

The Record also shows that it has been the practice in Minnesota for many years to lease real estate, both urban and agricultural, for rentals, cash or otherwise, and this was true during the year of 1923. Chapter 226, General Laws of Minnesota 1923, is the only statute providing for a tax on rentals.

III.

The Tax Legislation of Minnesota.

The General Tax System in force.

Before proceeding to an analysis of the royalty tax of 1923 it will be helpful to review briefly the general system of taxation which was in force in Minnesota when the new tax law was adopted.

The only constitutional provision in effect in Minnesota, on the general subject of taxation, is the requirement in Section 1, Article IX, of the Constitution that "taxes shall be uniform upon the same class of subjects".

With the usual exemptions, all real and personal property in Minnesota is subject to *ad valorem* taxation. Real and personal property is classified for purposes of taxation, the statute requiring that agricultural products be valued at 10% of their true value, live-stock, tools, machinery, etc., at 33⅓% of their true value, household furniture, etc., at 25% of true value, real estate, if platted, at 40% of its true value, and if not platted, at 33⅓% of its true value, and ore, whether mined or unmined, at 50% of its true value. In other words, the State tax laws already impose a heavy and unequal burden upon property containing iron ore. § 1993, Gen. Stats. Minn. 1923.

A special provision of the State Tax Law subjects "money" and "credits" after deduction of "debits" to a special tax of three mills on the dollar, and exempts them from all other taxation. *Ibid,* Sec. 2337*ff.*

In addition to this system of *ad valorem* property taxation, the State of Minnesota has adopted a system of so-called "lieu taxes" imposed upon certain kinds of corporations. Thus, railroad companies are subject to a tax upon the portion of their gross earnings properly attributable to business done within the state, after deducting rentals; express companies and freight line companies are subject to a similar tax after deducting all moneys paid for transportation; and

insurance companies, to a special tax upon gross premiums less return premiums. There are similar taxes affecting trust companies and telephone companies. In each case the taxing statute provides that the tax therein imposed shall be in lieu of all other taxes (or, in the case of the insurance company tax, in lieu of all taxes except real estate taxes). The constitutionality of these so-called lieu taxes has been sustained by this court, even as applied to corporations engaged in interstate commerce, upon the express ground that the tax is in lieu of all other taxes, and is "not in excess of what would be legitimate as an ordinary tax on property, taken at its real or full value." *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450.

Special Taxes Relating to the Mining of Iron Ore.

On April 11, 1921, the Minnesota Legislature adopted a so-called occupation tax, on "the business or occupation of mining ore", which marked a distinct departure from the previous policy of the State, in that it was not a lieu tax but was expressly stated to be in addition to all other taxes already imposed. §2373, General Statutes of Minnesota, 1923. The amount of the tax was 6% of the valuation of the ore produced during the year. The valuation of the ore was arrived at by deducting from its value after it had been brought to the surface, (*a*) the cost of bringing the ore to the surface; (*b*) a proportionate share of the cost of sinking and constructing shafts and running drifts, or, in the case of open pit mines, of removing the overburden; (*c*) the amount of royalties paid on the ore mined or produced; (*d*) a percentage of the *ad valorem* taxes on the realty. It should be noted that the deductions include a part only of the costs of mining, no deduction being allowed on account of costs of exploration, overhead, interest on investment, personal property taxes, or depreciation of plant, equipment, tools, etc.

The constitutionality of this statute was sustained by this court in *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, the court taking the view that the tax was what it purported to

be, namely, an occupation tax, and that such a tax could properly be imposed upon the business of mining iron ore without creating either an unconstitutional discrimination or an undue burden upon interstate commerce.

On April 11, 1923, the Minnesota Legislature adopted the statute involved in the case at bar, imposing a tax of 6% on "all royalty received * * * for permission to explore, mine, take out and remove ore from land in this state." "Royalty" was defined as "the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state, for permission to explore, mine, take out and remove ore therefrom." The tax was on the gross amount, no deductions being allowed on account of taxes paid, administrative or legal expenses of collection, amortization of capital investment, or any other expense involved in collecting the royalties.

The lower court in the present case took the view that the two acts were complementary; that the legislature looked upon ore lands as a taxable resource of the state which was gradually being exhausted by depletion of the mines; and that the two tax laws were designed to intercept and gather in to the state treasury a part of the value of this asset to the extent that it was being dissipated, the first law being designed to reach the value of the ore underground to the extent of the lessee's interest therein, and the second to the extent of the lessor's interest, as evidenced by his right to receive royalties.

It should be observed, however, that the two taxes are by no means equivalent. In fact, the contribution exacted from the person receiving royalties is much more onerous than the contribution exacted either from the lessee, who is operating the mine, or from the fee owner, who works his own property. This is true in the following respects:

1. The occupation tax is payable only with respect to ore actually mined and brought to the surface. If the mine is idle, or if the deductions allowed are greater than the value of the ore, as sometimes happens, no tax is payable. The royalty tax is payable whether or not the

royalty was received on account of ore actually mined. A royalty contract may provide a guaranteed minimum royalty, payable monthly or quarterly, whether or not ore is actually mined. (Indeed, it is common knowledge that such provisions are almost universal in ore royalty contracts.) The royalties received by the lessor under the guarantee are plainly taxable under the terms of the statute, which imposes a tax upon all royalty received "*for permission to* explore, mine and take out and remove ore from land in this state." Yet, where the mine is idle, neither a lessee nor a fee owner working his own mine has to pay the occupation tax.

2. In the second place, the lessee, or the fee owner working his own mine, may deduct a proportionate share of real estate taxes from the valuation of the ore upon which the occupation tax is based. In Minnesota, as in other states, real estate taxes are payable primarily by the owner of the land, whether or not it is subject to lease (except where the lessor is the State or some other body exempt from tax, in which case the tax laws make special provision for taxing the leasehold (Sec. 1996, Gen. Stats. of Minn., 1923)). If the lessor of iron ore has to pay such a tax, and is not, for one reason or another, in a position to obtain reimbursement from the lessee under the terms of his royalty contract, he is nevertheless not permitted to deduct the taxes from the amount received as royalties.

3. The lessee, or fee owner working his own mine, may deduct amortization on the cost of shafts and drifts constructed by him, or the cost of removing the overburden in the case of open pit mines. If, however, the lessor has incurred expenditures of this character before executing the lease (the expenditures being taken into account in fixing the royalty) he cannot deduct amortization of these expenses from the royalties taxable under the statute.

4. The final and most important difference grows out of the nature of the two taxes. One is an occupation tax, and hence an indirect tax, which becomes part of the cost of

mining, and can generally be shifted in large part to the consumer. The other is a tax upon income received from land, is a direct tax, and its incidence falls exclusively on the lessor of the land.

We shall return to these differences later, but mention them now as they are essential to a proper analysis of the two tax laws and of their relation to each other.

IV.

Legal Character of the Royalty Tax.

The Appellants' Interest in the Question.

Where the issue is whether a tax goes beyond the scope of reasonable classification sanctioned by state and federal constitutions, the precise name which shall be given to the tax, whether it is a license or excise tax, a property tax, or an income tax, is not always important. A tax may be so clearly motivated by a spirit of arbitrary and hostile discrimination that it is invalid, whatever category it may belong to. However, the considerations which affect the reasonableness of a classification may depend in part upon the incidence and legal character of the tax, and in any event we believe it will be necessary to clarity, before proceeding with the argument, to analyze briefly the nature of the tax imposed by the Act of April 11, 1923.

In order to be entirely frank, however, we should state that there may be differences of opinion regarding the real nature of the tax, between the appellants in the different cases now pending before this court involving the Minnesota royalty tax, which differences may or may not be relevant in connection with the cases at bar, but which have a bearing on another question of importance not now before the court. Without going into detail, it is sufficient to state that the appellants in this case, while appearing here in their capacity as lessors, have much larger interests in Minnesota as lessees and operators of ore lands. The leases

in many cases contain covenants providing that taxes upon the land shall be paid or reimbursed by the lessee, and if the present royalty tax should be held to be constitutional, the question would at once arise whether it was such a tax as was contemplated by the covenants in question. An analysis of the tax has led us to the conclusion that the tax is not a tax upon the land. Except insofar as the necessities of the case at bar require, we shall not, of course, attempt to argue the question here, but inasmuch as an analysis of the statute is essential to the presentation of the case at bar, it seems only fair to the court that we should state frankly the collateral interests which our clients may have in the question.

Legal Nature of Royalty Contracts.

It is settled by a series of decisions only recently reaffirmed in this Court, that royalty contracts of the kind here involved are not contracts for the sale of ore at a price per ton, or conveyances of a part interest in ore under ground, but true leases (without impeachment for waste). It is settled law that the royalties are rentals, of the same legal character as rentals for farm land, and constitute a part of the current income derived from the land, rather than the proceeds of realization of its capital value. Under the corporation excise tax, it was held that royalties must be included in gross income, and that no deduction could be made on account of depletion of the mine. This was held to be true even where it was shown that substantially the whole value of the land lay in the ore body, and that the ore body would be completely exhausted within a definitely ascertainable period.

Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503 (1917);

U. S. v. *Biwabik Mining Co.*, 247 U. S. 116 (1918);

Goldfield Consol. Mines Co. v. *Scott*, 247 U. S. 126 (1918).

For purposes of a state property tax, the Supreme Court of Minnesota has held that royalty payments not yet due constitute an interest in realty; but that as soon as the royalties mature and become payable they are "credits" and constitute personal property, the same as any other monies payable to the taxpayer.

State v. *Royal Mineral Ass'n*, 132 Minn. 232 (1916).

These decisions do not, of course, hold that royalties constitute net income. The decision is merely that for historical and technical reasons, although really constituting in part a conversion of capital investment into cash, royalties are to be considered as a part of gross income. Royalties do not constitute net income until all expenses and deductions incident to the realization of the income have been subtracted.

The Statute does not Impose a Tax on Property.

Both in the Act of 1921 and in the Act of 1923 the Legislature seems to have studiously avoided imposing a tax on property of any kind. Both statutes are carefully drawn, and suggest a conscious effort to avoid entirely the field of property taxation. Accepting the analysis of the court below in the case at bar, and the statements of the sponsors of the legislation (see Appendix B of this brief), the purpose of the Legislature was to draw into the treasury a part of the value of all iron ore mined within the State. The simplest way of accomplishing such a purpose would have been by imposing a special property tax, or capital levy, upon the ore in the ground or after it was mined. However, under the decisions in Minnesota, as well as under similar constitutional provisions in other states, a special property tax imposed upon one kind of property, not in lieu of but in addition to the regular *ad valorem* taxes, would have been clearly unconstitutional. In *State* v. *Canda Cattle Car Co.*, 85 Minn. 457 (1902), the Supreme Court of Minnesota had declared that "where the method adopted is a tax upon prop-

erty based on valuation, the rate imposed must be uniform, and apply alike to all who are thus taxed".

In *State* v. *Farmers & Merchants Savings Bank*, 114 Minn. 95 (1911), the court sustained, as a property tax, a tax on the "franchise" of savings banks measured by their assets, including personal property, after deducting deposits and accounts payable. On rehearing it developed that $3,750 of office furniture had been included in the valuation of the franchise, and had also been separately assessed as personal property. The court reversed itself as to this item, and said:

> "Since this property had already been taken into consideration in determining the surplus, it could not be separately taxed. Such a course would result in double taxation, which is forbidden by the Constitution, and is not authorized by the statute. * * *
>
> "Although special reference may not have been made in the opinion to Sec. 1, Article 9, of the State Constitution, the argument and decision were intended to include a consideration of the requirement that taxes must be uniform upon the same class of subjects."

In the *Ohio Tax Cases*, 232 U. S. 576, a railroad tax was attacked on the ground that it violated the uniformity clause of the Ohio constitution. It was sustained by this court on the express ground that it was not a tax on property, but a tax on the privilege of doing an intrastate business within the state.

In *Waring* v. *Mayor & Aldermen*, 60 Ga. 93, and *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss. 34, tax laws regarded as violating the uniformity clauses of state constitutions, if construed as property taxes, were sustained as franchise taxes.

In the *Kentucky Distilleries* case, 255 U. S. 288, a tax on whisky, which, this court held, could not be construed as a license or excise tax, was condemned under the state uniformity clause, as an additional tax on property already subject to tax.

The view that a special tax upon one particular kind of property would violate the constitution of Minnesota is further indicated by the fact that it was considered necessary in 1921 to adopt a special constitutional amendment authorizing the taxation of motor vehicles using the public streets "on a more onerous basis than other personal property", the amendment requiring, however, that the new tax be "in lieu of all other taxes thereon, except wheelage taxes". The tax was held to be a property tax in *State* v. *Peterson*, 159 Minn. 269. That it was found necessary to adopt such an amendment clearly indicates the belief that, under the general constitutional provision that "taxes shall be uniform upon the same class of subjects", a special tax upon one form of property, not imposed upon other property falling within the same general class, would be unconstitutional.

In the Act of April 11, 1923, also, the Legislature made it clear that it intended to avoid the constitutional pitfalls which would be encountered in imposing a special property tax, although here, as we shall show, they were not so successful in saving the constitutionality of the tax. It was familiar tax lore that a law might be clearly invalid under the uniformity clauses of state constitutions if construed as imposing a tax on property, and yet could be sustained, within reasonable limits, if it could be construed as an income tax. *Waring* v. *Mayor and Aldermen of Savannah*, 60 Georgia 93; *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss. 34. The device adopted in the Act of 1921, imposing a business or occupation tax, was not available, since many of the recipients of income from royalties would undoubtedly be found not to be engaged in business within the state (see *post*, p. 17). The tax was imposed, therefore, not on the land, nor on the business of receiving royalties, but on the "royalties received", that is, adopting the definition in the statute, on "the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state, for permission to explore, mine, take out and remove ore therefrom".

We do not suppose that the statute is to be taken literally as imposing a property tax on the physical money or other thing of value received by the lessor. Such a construction would raise so many questions of jurisdiction and situs that it would undoubtedly be rejected unless it were the only interpretation possible. A clear authority against such a construction, if one were necessary, would be *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283. The transfer tax considered in that case was imposed literally upon "all property * * * which shall pass by will or by the intestate laws of this state." In sustaining the tax, this court stated, that "the tax is not on money, it is on the right to inherit * * *." In his dissenting opinion in this case Mr. Justice Brewer said: "It seems to be conceded that if this were a tax upon property, such increase in the rate of taxation could not be sustained, but being a tax upon the succession, it is held that a different rule prevails."

It seems obvious that what the Minnesota Legislature intended to tax was not the royalties received, but the receipt of royalties.

In a dictum near the close of the opinion of the court below, it is said that the tax "is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid." This is not, of course, a statement that the tax is upon the land itself. A tax on land is a tax measured by the value of the land, or its acreage, or some other physical characteristic. It is levied against the land, and is a lien upon the land if unpaid. Moreover, the typical real estate tax is levied upon the whole interest in the land, and does not depend upon whether or not the land is under lease. The royalty tax here in question, on the other hand, has nothing to do with the value of the land, but depends upon whether or not it is under lease, and upon the amount of the royalty. It is not levied on the land, nor can the land as such be sold if the tax is unpaid. All that can be sold is the right of the lessor to receive royalties, and the reversion (if he is the owner thereof) after the lease expires.

What the court apparently had in mind was that the *res* subject to the tax was the lessor's interest in the realty, that is, the reversion and the right to receive royalty. To state the matter more accurately, the *res* was considered to be the right to receive royalty, considered as an incorporeal hereditament, since it is, of course, quite possible that the person entitled to the royalty is not the owner of the reversion. Considered in this guise, the statute encounters, as we have shown, obstacles under the State Constitution which it was the obvious intention of the Legislature to avoid. It singles out for property taxation one particular form of property, namely, reversions or royalty rights in lands containing iron ore. It does not even tax all such reversions or royalty rights, but only such as produce gross income to the owner during the year. In one case, the reversion may be of great value but the royalty small. In another case the royalty may be large but the reversion practically worthless; yet the more valuable reversion in the first case would be taxed at a lower rate than the less valuable one in the latter case.

It is difficult to see upon what reasoning the court based its dictum that the tax is upon the lessor's property rights, unless it was in the belief that, by attaching the taxable *res* to real property within the state, the application of the tax to non-resident lessors would be facilitated. Whether such application was intended by the legislature need not now be considered; we will assume for the purposes of the present argument that it was. It is now settled that a state may constitutionally tax income derived by a non-resident from property within the state.

Shaffer v. *Carter,* 252 U. S. 37.

This case sustained a tax imposed by Oklahoma on income derived by a resident of Illinois from Oklahoma oil and gas leases. There is no suggestion in the opinion of the court in *Shaffer* v. *Carter* that it was necessary to construe the tax as a property tax in order to sustain it. The only significance which the court attached to the presence of the prop-

erty within the state was that it afforded a practical means by which the tax on the non-resident's income could be collected if not voluntarily paid.

It is possible that the dictum of the District Court is attributable to certain language in some of the opinions in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 611. The income tax involved in that case was a general one, and in concluding that it was a direct tax within the meaning of the Federal Constitution the court relied largely upon the fact that taxable income might include income derived from lands. Here and there in the opinions there are suggestions that the tax, in this respect, was "a tax upon land". The opinions make it clear, however, that the court was discussing not the *res* which was subject to the tax, but the economic incidence of the tax in so far as it included income derived from land. The argument was that a tax upon rentals reduces the value of the land and therefore in an economic sense falls on the owner of the land. This line of reasoning is clearly indicated in the following extract from the opinion of Chief Justice Fuller in the case on rehearing (p. 618):

> "Our previous decision was confined to the consideration of the validity to the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; *and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.*" (Italics ours.)

Any suggestion that a tax on rentals is a tax on land (except in the economic sense above indicated) is entirely inconsistent with the interpretation of the *Pollock case* by this Court in *Brushaber* v. *Union Pacific* (240 U. S. 1).

In order to complete our analysis we should mention here another suggestion which seems to us clearly untenable, namely, that the royalty tax statute is in substance a business or occupation tax, imposed on the business of receiving royalty. We believe that the decision of this court in *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, completely disposes of this suggestion. In that case the statute imposed a tax of 50 cents a gallon on all whiskey withdrawn from bond within the state, or transferred in bond to a point outside the state. The court pointed out that the tax could not be sustained as a tax on the business of removing whiskey from bond or from the state, because it would be payable even upon a single transaction, whereas a single transaction would clearly not constitute doing business within the state. The receipts by way of royalty are taxable under the apparent terms of the Minnesota statute whether or not the recipient transacts any business within the state, and even if he receives only a single item of royalty during the year. Nor is there any suggestion in the terms of the statute that an occupation tax was intended.

Not being a tax on the land as such, nor on the reversion or incorporeal hereditament owned by the lessor, nor on the royalties considered as money or other personal property, nor on the business of receiving royalties, our analysis leads us to the conclusion that the tax is exactly what it purports to be, namely, a tax on gross receipts by way of royalty from iron ore lands within the state. We believe that the legislature, familiar with the interpretation given to the state constitution, and to similar constitutional provisions in other states, intentionally gave the tax this form, in order to avoid the supposedly greater constitutional difficulties involved in imposing a direct property tax. We will attempt to show, however, that the effort to save the constitutionality of the tax failed, since even as a tax upon gross royalty receipts the statute violates the 14th Amendment of the Federal Constitution and Article 9, Section 1 of the Constitution of Minnesota.

V.

Specification of Errors Urged.

The Court erred:

I.

In dismissing plaintiffs' bill of complaint and entering a decree for the defendants.

II.

In holding that the tax imposed by Chapter 226 of the Laws of Minnesota 1923 is not in violation of Article I, Section 10, of the Constitution of the United States, which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts."

III.

In holding that the tax so imposed is not in violation of Article IX, Section 1, of the Constitution of the State of Minnesota, requiring that taxes shall be uniform upon the same class of subjects.

IV.

In holding that the tax is not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the state the equal protection of the laws.

V.

In holding that the tax is a tax on the interest of the lessors in mining properties, if by so holding the court intended to hold that the tax is a tax upon land.

VI.

In holding that the tax, if held to be a tax on land, is valid notwithstanding the constitutional provisions above referred to, although mining properties not operated are not subject to the tax.

VII.

In holding that the tax, if held to be a tax on land, is valid notwithstanding the constitutional provisions above referred to, although other wasting properties are not subject to the tax.

VIII.

In holding that the fact that iron lands are being depleted of their natural wealth furnishes any proper basis for classification under which they may be subject to special and double taxation.

IX.

In failing to hold that the tax, if held a tax upon land, operates unequally against the plaintiffs in that no corresponding tax is imposed upon any land other than mineral lands operated on a royalty basis, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

X.

In failing to hold that the tax, if a tax upon the sale price or the proceeds of mineral lands or of the iron ore therein, operates unequally against the plaintiffs in that no corresponding tax is imposed upon the proceeds of the sale of any lands other than mineral lands and when such proceeds are received by way of royalties, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XI.

In failing to hold that the tax, if a tax on rents and profits of mineral lands, operates unequally upon the plaintiffs in that no corresponding tax is imposed upon rents and profits except when the same accrue to the owner thereof in the form of royalties, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XII.

In failing to hold that the tax, if an income tax, operates unequally against the plaintiffs herein in that no corresponding tax is imposed upon income from any other source, including income derived from mineral lands other than in the form of royalties, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XIII.

In failing to hold that the tax, if a tax upon moneys received as royalties, operates unequally against plaintiffs in that no corresponding tax is imposed upon moneys derived from other sources, and that such attempted classification of moneys and credits according to the source from which derived is unreasonable and invalid, all in violation of the Fourteenth Amendment of the Constitution of the United States and Section 1 of Article IX of the Constitution of Minnesota.

XIV.

In failing to hold that the tax is a hostile discrimination in the guise of a tax and, therefore, a denial of equal protection of the laws and a taking of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

XV.

In failing to hold that the royalties received by the plaintiffs Lake Superior Consolidated Iron Mines and Northern Development Company, received by them in the State of New York, have no situs within the State of Minnesota for the purpose of taxation and are not subject to the tax imposed by said act.

XVI.

In failing to hold that plaintiff was entitled to the relief prayed for in the bill of complaint and to enter a decree permanently enjoining the defendants from enforcing the provisions of said act.

VI.

Summary of Argument.

(A) The Act is unconstitutional because the classification adopted is arbitrary and unreasonable.

The Minnesota royalty tax is imposed on gross income derived from iron ore royalties, no other form of rental or of income from land or from any other source being taxed. It is not imposed in lieu of property taxes, but in addition thereto. It is a direct tax and its burden cannot be shifted. Thus to single out income in the form of rental from one form of property for burdensome taxation violates the 14th amendment of the Federal Constitution and § 1, Article IX, of the constitution of the State of Minnesota.

The classification cannot be justified on the theory that iron ore is a "wasting asset". Moreover insofar as this theory rests upon the fact that a large part of the iron ore mined is shortly removed from the State, it is inconsistent with the spirit of the commerce clause of the Federal Constitution.

(B) The Act is unconstitutional because it operates in an arbitrary and unequal way upon the class or subject selected for taxation.

Even within the class upon which it operates, namely recipients of income from iron ore mines, the tax operates in an unequal and arbitrary way. Owners operating their own properties are treated differently from owners leasing their properties. Owners disposing of iron ore deposits by sale are treated differently from owners disposing of them on a royalty basis. The Act is therefore invalid because of lack of uniformity in its operation within the class selected.

VII.

The Argument.

A.

The Act is unconstitutional because the classification adopted is arbitrary and unreasonable.

The substantial question presented in this case is whether an attempt to put gross income from royalties in a class by itself, and to impose upon such income a tax not applicable to income from any other source, not in lieu of but in addition to the general property taxes, violates the equal protection clause of the Fourteenth Amendment or Article 9, Section 1, of the Minnesota Constitution.

We will not burden the court by multiplying quotations as to the broad power of classification permitted to the legislature. The decisions fall largely into two categories: Cases involving taxes imposed upon corporations, in lieu of ordinary property taxes, or in an effort to reach intangible elements of property not touched by general property taxes; and cases involving business or occupation taxes. Even *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, involved a

tax which, while in form a tax on coal, was payable only on coal mined during the year and ready for shipment. In substance it was an excise tax on the mining of coal. It is settled that the business or occupation of mining iron ore can be made the subject of a special occupation tax not imposed on other types of business. *Oliver Iron Mining Co.* v. *Lord, supra.*

The Minnesota royalty tax does not, as has been shown, fall within either of these categories. It is not a tax imposed in lieu of all other taxes and it cannot be construed as an occupation tax on the business of receiving royalties (even assuming that such a tax would rest upon a proper classification). It is a tax on money (or its equivalent in property) received in the form of royalties. Whatever may be the scope of classification in the case of occupation taxes, it is submitted that money received as royalties cannot be singled out and placed in a class by itself. Money received as royalties is no different from money received as income in any other way There is clearly no distinctive character to the income itself which could be urged as a basis for classification. Can the State nevertheless classify it according to the source from which it is derived? Granted that the State can classify income according to its source, can it single out the income from iron ore lands? Can it go still farther and single out income derived from such lands in the form of royalties for separate and highly burdensome taxation? It is our contention that, with certain exceptions which are not applicable here, income cannot be classified according to its source, but that, even if it were possible to classify income according to its source, the singling out of income derived in this particular way from this one source is intrinsically an arbitrary selection and further, when viewed in the light of certain facts of which the Court may take judicial notice, is a hostile and oppressive discrimination.

A tax on the income derived from business or personal services is only one form of an occupation tax and here there

is a particularly wide range of classification permissible. Again there are various constitutional provisions which may justify or require the exemption of income from certain sources, but in general there is no justification for classifying income derived from property or investments according to its source. Income is income. Money received as income from one form of property is no different from money received from another. The income received from renting farm lands is no different from the income received from renting mineral lands. It is just as arbitrary to classify the receipt of income according to its source as to classify the money or other property when received according to its origin. It has been held in cases involving property taxes that it is improper to discriminate against particular property merely on account of its origin.

Illustrating this is the case of *People ex rel. Phillips* v. *Raynes*, 136 App. Div. 417, affirmed in 198 N. Y. 539, which involved a license tax on persons selling convict goods. The Appellate Division, First Department, in holding the classification "unreasonable and capricious", pointed out that the classification was based upon the origin of the goods dealt in without regard to the quality or character or nature of the goods themselves.

So in *State* v. *Hoyt*, 71 Vt. 59, in which a law imposing a license fee upon peddlers selling goods which were manufactured in Vermont was held unconstitutional. The Court held that the tax was one upon property, and that the only basis used for classification was the origin thereof, and further held that goods manufactured in Vermont were no different from goods of the same kind manufactured in New Hampshire or some other state, and the attempted classification upon the basis of the source or origin of the goods was unconstitutional as being without any relation to the subject matter or the purpose of the tax.

The case of *Woodruff* v. *Oswego Starch Factory*, 177 N. Y. 23, is no authority for the proposition that income in the form of rents may be separately classified with reference to its source. In that case the law provided that rents reserved

should be capitalized and taxed as personal property belonging to the lessor. Apparently when so classified they were merely dealt with as all other personal property and subject to the general personal property tax.

We do not mean to imply that some degree of classification of income is not proper in connection with general income taxes. The classification is proper if it turns upon some reasonable difference in the nature or condition of the taxpayer. Some classes of taxpayers may be exempted entirely and as to others the tax may be graduated according to the taxpayer's ability to pay. Corporations may be taxed differently from individuals, and public service companies differently from commercial concerns. *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U. S. 413. "Earned" income may, no doubt, be taxed differently from "unearned", for here again there is a valid classification based on the taxpayer's ability to pay and on the policy of the government to encourage productive work and discourage idleness. Again income from capital gains can no doubt be taxed at a different rate from current income. These are classifications based on inherent and relevant characteristics, and bear no resemblance to a classification which singles the gross sums received as rental from a particular type of property, no other rental and indeed no other form of income being similarly taxed.

Between an occupation tax on the business of mining and a tax upon gross income from royalties there is a fundamental distinction which must not be lost sight of.

Whether a tax is levied as an occupation tax or as in the *Heisler* case in the form of a property tax upon the "manufactured" product at the instant it is ready for market, it is in the economic sense an indirect tax. The burden of the tax will normally be shifted to the public. At the outset there is necessarily some hardship particularly where there is close competition with some industry not burdened, but later as the tax is shifted to the public superficial inequalities are ultimately equalized. The royalty tax, however, cannot be classed with taxes such as these. We have seen that it is

a tax upon the income from land. As such it is in the economic sense a direct tax. The recipient of royalty must bear the full burden of any discrimination,—he cannot shift it to the public. Since the value of his property is largely determined by the capitalized value of the income anticipated from it, a tax upon that income will immediately, if it is deemed to be a permanent tax, diminish *pro tanto* the value of the source of income. If the royalty tax should be sustained it would decrease by six per cent. the value of all reversions to which the royalties are incident. In dealing with taxes of this character the refinements of classification must be very closely scrutinized lest taxation degenerate into confiscation. Certainly the possibilities of abuse in classification are far greater here than in the case of taxes which place burdens upon industry.

Perhaps it was this very distinction which this court had in mind in the *Oliver* case when it stressed the fact that the tax there considered was not a property tax but an occupation tax and valid as such. At 262 U. S. 179, it is said:

> "Consistently with both provisions the legislature of the State may exercise a wide discretion in selecting the subjects of taxation, *particularly as respects occupation taxes.*"

While taxes upon businesses or upon their products have quite commonly singled out particular industries or products, all the force of tradition is opposed to any subclassification of real property or of income therefrom. We can find very few cases where attempt was made to subdivide the general class of real property. The absence of any such cases is not without significance. A tax on land suggests at once the general property tax embracing all lands except the very small exempted class of lands devoted to charitable, religious and educational purposes. It does not suggest a series of separate taxes on farm lands, grazing lands, forest lands, city lands, etc. In a decision of this court, which according to 1 Cooley's Taxation, 4th Ed., at page 535, is

"cited more often * * * than any other decision" as an authority for allowing to the Legislature a wide range of classification, we find no suggestion that such a subclassification would normally be appropriate. The case is *Bell's Gap Ry. Co.* v. *Pennsylvania,* 134 U. S. 232. It holds (p. 237) that the Fourteenth Amendment

> "was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institution. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only, and not tax securities for the payment of money. It may allow deductions for indebtedness, or not allow them. * * *"

Again in *Home Insurance Company* v. *New York,* 134 U. S. 594, the Court speaking through Mr. Justice Field said (p. 606):

> "But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

The contrast between these statements and the quotation from *Oliver Iron Mining Co.* v. *Lord,* given at page 27, *supra,* shows very plainly that there is a real distinction between attempts to subclassify real property and classifications as applied to taxes burdening industry.

It is easy to imagine the far-reaching consequences of a failure to observe this distinction and the adoption of a rule which would permit a subclassification of income from real property according to any superficial characteristic which may mark it off in the popular mind. The Legislature might

tax the income from farm lands and exempt income from city property; might tax income from farms containing more than eighty acres and exempt income from smaller farms; might tax income from farms having clay soils and exempt income from farms of sandy soils; might tax income from land lying at more than a certain heighth above sea level and exempt income from land at a lower level. That combination of property owners which happened to be politically dominant could shift the burden of taxation to some artfully selected class of property owners who happened to have slight political power. Unless the courts would define some limit to the amount of taxes, classification would become a synonym for confiscation and there would be no security in the ownership of land or other property of a fixed and permanent character.

It is not contended by us that under no conceivable circumstances could the income from real property be subclassified as a subject of taxation. It is conceivable that various circumstances might arise in which it might be shown that such a subclassification had some reasonable relation to some legitimate legislative policy. But in the light of tradition such a sub-classification is *prima facie* to be viewed with suspicion, because normally such a subclassification would not have any relation either to the benefits received by the owners of such property or their ability to pay taxes, nor to any policy in promoting the industry of the State, nor to anything else but the desire of the politically dominant to place an undue portion of the burdens of taxation upon a class of persons having slight political power.

But it is not necessary to resort to a speculation as to the possibilities of abuse which would be opened up by the sustaining of this tax. The tax itself is both burdensome and highly unfair, and its unique character, interpreted in the light of the history of the times, indicates quite plainly that it was designed to accomplish a hostile discrimination against a class, the recipients of royalties, many of whom are nonresidents of this state.

The full extent of the discrimination only appears when we consider that the income singled out for taxation is from a source already bearing a disproportionate share of the burden of taxation. Under an earlier law now appearing as Section 1993 G. S. 1923, lands from which royalties are derived are taxed at a higher valuation than other property. This act provides for the separate valuation of the surface and the underlying ore. Iron ore whether mined or unmined is valued at 50 per cent. of its true value while realty other than ore lands is assessed at 40 per cent. of its true value if platted and at 33⅓ per cent. of its true value if not platted. The constitutionality of the sections of this act which thus attempt to subclassify real property and to value differently the subclassifications has never been passed upon either by this court or by the Supreme Court of Minnesota. Even taken by itself the earlier act seems to us to involve an arbitrary discrimination against the owners of ore lands. Nevertheless it may be that differences in the feasibility of valuations or in the benefits received would justify a relatively slight discrimination, but the discrimination is so marked that such arguments must be stretched to the breaking point in order to afford a justification for it. They surely cannot be urged to justify the piling of discrimination upon discrimination to the extent effected by the royalty tax.

Section 1993 of the General Statutes 1923 is also significant as a forerunner of a series of acts and proposed acts culminating in the royalty tax which taken together evince a determined policy to single out those who derive income from ore lands for highly burdensome taxation. Many of these persons are nonresidents; in fact, nonresident individuals and corporations received nearly 50 per cent. of the royties paid in 1923.

The acts we have in mind include among others the tonnage tax act of 1919 which was vetoed by Governor Burnquist, the act proposing a constitutional amendment (afterwards adopted) authorizing an occupation tax and placing

a part of the proceeds thereof aside for future generations, the occupation tax involved in *Oliver Iron Mining Co.* v. *Lord, supra,* and finally the royalty tax. In addition to these legislative acts we ask the court to take judicial notice of certain extracts from the messages of Governors Burnquist and Preus and also an extract from Chapter 5 of the Seventh Biennial Report of the Minnesota Tax Commission published in 1920. These are collected in Appendix B to this brief.

In determining the object of the Legislature and its real intent, the court will consider the history of the times.

United States v. *Freight Assn.,* 166 U. S. 290, 318, 319;

Church of the Holy Trinity v. *United States,* 143 U. S. 457, 463;

Ross v. *Schooley,* 257 Fed. 290, 291 (certiorari denied 249 U. S. 615);

United States v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79, 81;

Platt v. *Union Pacific R. R. Co.,* 99 U. S. 48, 59, 64.

The court may resort to messages of executives and reports of administrative bodies to the Legislature.

Johnson v. *So. Pac. Co.,* 196 U. S. 1, 19;

Clendaniel v. *Conrad,* 3 Boyce, 549;

Woodward v. *DeGraffenried,* 238 U. S. 284, 295.

Of the various arguments urged in support of taxes burdening those who own ore lands or are identified with the iron mining industry there is one line of argument which is particularly significant. It is referred to both in Governor Burnquist's veto message and in the report of the Tax Commission. This is the argument that iron ore is a heritage of the state and a wasting asset. As phrased by the Tax Commission the argument is:

> "Iron ore being a product of nature, its presence in the ground not being the result of the expenditure of capital or labor, is a natural heritage of all the people, and as such, the people are justified in appropriating to

their use, in some form of taxation, some considerable part of the value arising from its exploitation.

"That it does not reproduce itself, therefore its value is diminished by use through depletion, and that because of this diminishing value it should bear a heavier tax than other forms of natural property not diminished by use.

"That under existing conditions the bulk of this great natural heritage is gradually being removed from the state to enrich other states, and that eventually its value as a taxable state asset will have disappeared through depletion due to shipments, and in its place will be found only valueless 'holes in the ground', and that for this reason the state is justified in exacting a heavy toll in the form of super-tax for the depletion and disappearance of its natural wealth."

The fact that such arguments as this were generally advanced in support of the act, the fact that nearly 50 per cent of the royalties would be paid to nonresidents, and the fact that the iron mines are all located within a relatively small area in the northeastern part of the state, all point to the conclusion that there has been a deliberate attempt not to tax but to seize property under the guise of taxation by singling out for discriminatory action those who receive income from ore lands in the form of royalty.

Throughout the legislative history of this law, as well as in the opinion of the court below, we find implicit this thought that the tax can be justified because iron ore is a "wasting asset", which will sooner or later be exhausted, leaving the state nothing to tax. The same justification was urged in support of the Act of 1921, but in this court that act was sustained as an occupation tax, and there is no suggestion in the opinion that the court gave any sanction to this curious theory. In the present case, however, there is no basis for sustaining the tax as an occupation tax, and its supporters have to rely even more heavily upon the "wasting asset" theory.

The theory is that farm land, or timber land subject to reforestation, or city property, yields an annual income with-

out impairing the value of the *corpus* of the property. The land is always there, an unending source of revenue to the state. But mining property is gradually depleted by use; hence the state must make haste to gather as much as it can by way of tax before the ore is entirely exhausted. The difficulty with this theory is that if ore property is a wasting asset from the point of view of the state, it is just as much a wasting asset from the point of view of the owner. Suppose that an investor purchases today, for $1,000,000 a mining property which has a probable life of twenty years and which will be substantially worthless at the end of that period. To maintain his investment intact, he must not only obtain a reasonable return on the $1,000,000, but an additional amount sufficient, if accumulated, from year to year, to restore the $1,000,000 at the end of twenty years. Part of what he receives is a return on investment, part of it represents capital converted into cash. If Minnesota had a general tax on all net income, it would undoubtedly permit owners of mining property to deduct from receipts by way of royalties an annual item of depletion, in recognition of the fact that ore is a wasting asset. In the present case, by a strange twist of logic, the fact that ore is a wasting asset is seized upon not as a reason for granting indulgence to the taxpayer, but as a reason for singling him out for special taxation not applicable to recipients of other forms of income. The recipient of iron ore royalties is not even permitted to deduct a reasonable allowance for depletion. Far from affording a justification, the fact that iron ore is a wasting asset merely heightens the injustice of the tax. The fact that human energy and capacity is a wasting asset has been advanced as a valid reason for taxing so-called "earned" income at a lower rate than income from property or investments. We have never heard it advanced as a reason for imposing a special tax on "earned" income, not imposed on income from other sources. The "wasting asset" theory, as advanced by the supporters of this legislation, would warrant a special

tax on income of men over sixty years old, on the ground that they will soon cease producing any income for the state to tax.

The argument with regard to "wasting assets" needs to be further analyzed in another direction. Ore mined, manufactured and used in the State of Minnesota is not, of course, withdrawn from the State's taxing power. If it is converted into the steel girders of an office building or the rails of a common carrier, it is not only retained within the state, but at a greatly increased value. It is withdrawn from the taxing power only when it is either used up or exported from the state. The significant fact upon which classification of royalties derived from iron ore was based was not the fact that the ore is gradually extracted from the ground, but that a large part of it is usually exported from the state. It is settled by *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 and *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, that a tax does not improperly burden interstate commerce because it is imposed upon property immediately destined for use in other states, and of course we do not now ask a reconsideration of this question. However, it is one thing to sustain a tax otherwise found to be based upon a valid classification notwithstanding it "may indirectly or incidentally affect" interstate commerce. It is quite another thing to seize on the fact that the greater part of the property in question is to be exported from the state, as in itself a justification for a classification which cannot otherwise be justified. Clearly the commerce clause prevents the legislature from putting into effect a classification which has no "reasonable relation to any permitted end of government action" but is based entirely upon an apparent desire of the legislature to discourage or to seize part of the profits incident to the exportation of property from one state into another.

This court has repeatedly asserted that the Fourteenth Amendment strikes down hostile discriminations between particular persons and classes. In *Citizens' Telephone Co.*

v. *Fuller,* 229 U. S. 322, the court, after reviewing cases showing the breadth of the power of classification, said (p. 331):

> "They illustrate the power of the legislature of the State over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. *Cook* v. *Marshall County,* 196 U. S. 261, 274; *Missouri* v. *Dockery,* 191 U. S. 165. The cases decided subsequent to the decision in *Bell's Gap Railroad Co.* v. *Pennsylvania* have applied its principal to many varying instances. Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney* v. *New York,* 222 U. S. 525, 536. The State is not bound by any rigid equality. This is the rule:—its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interest of society require.'"

It is to be noted that the Court had in mind and expressly referred to discriminations between classes, presumably proper classes for taxation purposes.

In *Dane* v. *Jackson,* 256 U. S. 589, decided June 1, 1921, while the court held constitutional an act of Massachusetts providing for the distribution, in a way which was alleged to be violative of the due process and equal protection clauses, of an income tax, the Court also said that (p. 599):

> "Where, as here, conflict with federal power is not involved, a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.'"

The court cited in support of this statement *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 615; and *Wagner* v. *Baltimore,* 239 U. S. 207, 220.

The last cited case, *Wagner* v. *Baltimore,* which involved the constitutionality of a state assessment for the expense of a public improvement, after holding that the state might determine the amount of the assessment without giving an opportunity to the owners to be heard, said (p. 219):

> "We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land owners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise. But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject."

In *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, the Court, after stating generally the broad field in which a state may classify subjects of taxation, said by Mr. Justice Bradley (p. 237):

> "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

This last quotation makes an appropriate text for a summary of our objections to classifying the income from ore lands separately as a subject of taxation. It is, as we have seen, an entirely unprecedented selection, an arbitrary subdivision of the traditional class, income from real property. It

places a very heavy burden upon the recipients of royalties, entirely out of proportion to what would be a just contribution on their part to the revenues of the State. No legitimate legislative policy has been suggested as affording a basis for the selection. On the contrary reference to the political and legislative history preceding the passage of the Act shows a desire to seize a portion of the income from property which was unwarrantedly regarded as a "heritage" of the State.

We therefore submit that the Act is unconstitutional because the classification adopted is arbitrary and unreasonable and shows an attempt to make a hostile discrimination against the recipients of royalties from iron ore.

B.

The Act is unconstitutional because it operates in an arbitrary and unequal way upon the class or subject selected for taxation.

Even if we could assume that gross income derived from iron ore might be selected as a subject of taxation, it would still be necessary, both under the 14th Amendment and under the express terms of Article 9, Section 1 of the Minnesota constitution, that all gross income falling within that class be treated alike. Even this result has not been accomplished by the Minnesota legislature, as the Royalty Tax law discriminates in a purely arbitrary manner between recipients of such income by way of royalties, and recipients of similar income in other forms.

We have already pointed out the serious discrimination between lessees, or owners who operate their own properties, and owners who lease their properties on a royalty basis (see p. 8 of this brief). The owner, operator or lessee pays a tax which has many, though not all, the protective features of a net income tax. He may deduct the cost of bringing the ore to the surface, taxes, royalties, and

amortization on the cost of certain capital improvements. The owner-lessor is allowed no deductions whatever. If the lessor, prior to making his lease to the operating lessee, incurred expenditures in developing his property, such as stripping the surface or constructing shafts, drifts, etc., a part of the royalty which he receives represents amortization or reimbursement of the money so expended. He is nevertheless taxed for the full amount of the royalty, without any deduction on this account. If any discrimination is permitted between income by way of royalties and income by operation of lands leased or owned in fee, surely the discrimination should be in favor of the lessor rather than against him, for the operator can cease mining ore if he does not care to pay the tax; and in the long run the tax which he pays on the business of mining ore will be shifted to consumers. But the lessor, especially if he made his lease before the tax took effect, cannot cancel the lease, or shift the burden of the tax.

Another important discrimination is illustrated by the following case. Suppose that A is the owner of iron ore underground, and leases it for exploitation on a basis which will yield him about $100,000 a year royalty for twenty years, the mine being exhausted and the property valueless at the end of that period. B is the owner of a similar deposit, and sells it outright, the price being payable in twenty annual installments of $100,000 each, whether ore is mined or not. In their economic and financial aspects, the two transactions are substantially the same, except that in A's case the annual payment may be subject to a certain degree of fluctuation, while in B's case it is fixed. Yet A pays a tax of 6 per cent. on the annual payments, and B pays no tax.

Even between different recipients of income by way of royalty, there are discriminations of a serious character, if we look at the tax as one upon the income drawn from the land by the owner-lessor. The failure to make any allowances for depletion, while it does not rob the tax of its

character as an income tax, causes its burden in effect to fall largely upon capital value rather than upon income as such. This results in an inequality in the operation of the tax upon the recipients of royalties according to the proportion of depletion or capital conversion represented by their royalties. The case of the Merrimac Mining Company cited by other counsel is an illustrative one.

Again it is a fact disclosed by the record in companion cases that many of the lessors have spent very considerable sums for engineering, accounting and other matters connected with their mines. The failure to allow deduction of these items again results in an inequality between those lessors who incur such expenses and those who do not.

A fee owner may before leasing his mine strip and develop or sink shafts, drifts, etc. and thus invest large sums of money, leasing the property after the development is made and thus securing a return of his investment in development work in the form of royalties. Here again he is not allowed any deduction and pays the same rate of tax as the fee owner who has not sustained any such expense.

All of these are instances of unequal operation of the act within the class which it purports to select for taxation, that is, income or royalties received for permission to explore, for mining and removing iron ore. The act is invalid because of the lack of uniformity in its operation within the class.

VIII.

Conclusion.

In conclusion, we submit that the decree of the District Court, dismissing the bill of complaint, must be reversed with a direction to the Court to grant to the plaintiffs (appellants herein) the relief prayed for, and that the defendants be perpetually restrained from attempting to enforce the provisions of the Minnesota Royalty Tax (Chap. 226, Laws of 1923) against any of the appellants herein.

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APPENDIX A.

Text of Act.

CHAPTER 226—H. F. No. 29.

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Tax on iron ore royalties—Rate—There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

SEC. 2. Definitions—For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, copartnerships, associations, companies and corporations.

SEC. 3. Annual Reports to Tax Commission—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission, a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

SEC 4. Contents of Reports—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth;

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.

2. The amount of royalty paid on each tract of land separately.

3. The name and post office address of each person to whom royalty is paid, and

4. Such other information as said commission may require.

SEC. 5. Tax Commission to Assess Tax.—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

SEC. 6. Penalties for Non-payment—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, *prima facie* evidence of the facts therein stated.

SEC. 7. Date of Payment—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10 per cent.) shall immediately accrue thereon.

SEC. 8. Tax a Lien on Lands and Ore—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular and right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

SEC. 9. Auditor to Make Draft—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

SEC. 10. Treasurer to Collect Tax—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent. per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent. per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

SEC. 11. Penalties for False Returns—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent. of the amount of said tax; and

any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

SEC 12. Records to be Open to Inspection of Tax Commission—Violations and Penalties—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefore as provided by law.

SEC. 13. Taxes to be Paid into General Revenue Fund—All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

SEC. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923.

APPENDIX B.

Legislative Acts and Extracts of Messages of Governors Preus and Burnquist and from the Report of the Minnesota Tax Commission of which the Court is Asked to Take Judicial Notice.

A much more complete collection of such speeches and documents can be found in the record of *Oliver Iron Mining Company* v. *Lord*, 262 U. S. 172.

1. *Extracts from Veto Message of Gov. J. A. A. Burnquist in Connection with the Tonnage Tax Act of 1919.*

"STATE OF MINNESOTA,
Executive Department, Sept. 19, 1919.

Hon. W. I. NOLAN,
Speaker House of Representatives:

"I am returning herewith without my approval House File No. 23, 'A bill for an act providing for the levy and collection of a tax upon the value of ore from persons, associations, corporations and joint stock companies engaged in the mining or production thereof.

* * * * * *

The whole subject, therefore, narrows itself down to the question as to whether the iron properties should be taxed to a still greater extent and differently from other property, because as the proponent of the proposed tax says, 'The body of iron ores is diminishing and nothing will eventually be left but holes in the ground.'

Unsound and Illegal.

Those who live in the communities affected to the greatest extent by the removal of this property are practically unanimous against the proposed law. Some of those who live in other sections of the state and who would be the least affected by the disappearance of the ore, advocate the taxing of the Northeastern section of Minnesota on a different basis from other portions of the state. Any theory which holds that certain properties by being removed diminishes in value the land from which it is taken, therefore being taxed at a higher

rate than other properties, is unsound and illogical. The fact that most of the iron ore is taken out of the state is no more of an argument for increasing the taxes thereon than the removal from the state of lumber, granite, grain or any other property would be the ground for increasing the taxes on the last named commodities. The iron ore is being converted continually into taxable subjects, such as buildings, machinery, and other instrumentalities upon which taxes must be paid. It is true that all of these taxes that are imposed are not paid in Minnesota but that is no reason for taxing iron ore in a different way from that applied to other Minnesota products which are removed from the state and converted into different forms of property elsewhere.

Opposed Confiscation by Taxation.

It is also contended that the iron ore intended to be taxed by the measure now under discussion is the product of Nature and formerly property of the state of Minnesota, and for that reason should be taxed on a different basis than other property. The fact is that iron ore is not the product of Nature to any greater extent than the soil, and that the state originally owned none of this property but did acquire a small portion thereof by grant from the Federal government. If any individual or corporation has procured from the state a title to iron land illegitimately, it should resort to the courts and not to the legislature for relief. If, however, the land has been honestly acquired by the owners thereof, the state has no right to attempt to take it by legislation under the guise of taxation.

* * * * * *

Very respectfully yours,

J. A. A. BURNQUIST,
Governor."

2. *Act Proposing Constitutional Amendment Afterwards Adopted, Authorizing an Occupation Tax and Placing a Part of the Proceeds Thereof Aside for Future Generations.*

(Being Chapter 529, H. F. 761, Session Laws of Minnesota, 1921.)

"An Act proposing an amendment to Section 1 of Article 9 of the Constitution of the State of Minnesota by adding thereto a new section imposing a tax upon per-

sons, co-partnerships, companies, joint stock companies, corporations, and associations however or for whatever purpose organized, engaged in the business of mining or producing iron ore or other ores and providing for the distribution of such taxes.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That the following amendment to section 1 of article 9 of the constitution of the State of Minnesota is hereby proposed to the people of the State of Minnesota for their approval or rejection, that is to say: Section 1 of Article 9 of the constitution shall be amended by adding thereto a new section to be known as section 1A, which new section shall read as follows, to-wit: Section 1A. Every person, co-partnership, company, joint stock company, corporation, or association however or for whatever purpose organized, engaged in the business of mining or producing iron ore or other ores in this state, shall pay to the State of Minnesota an occupation tax on the valuation of all ores mined or produced, which tax shall be in addition to all other taxes provided by law, said tax to be due and payable from such person, co-partnership, company, joint stock company, corporation, or association however or for whatever purpose organized, on May first of the calendar year next following the mining or producing thereof. The valuation of ore for the purpose of determining the amount of tax to be paid shall be ascertained in the manner and method provided by law. Funds derived from the tax herein provided for shall be apportioned; fifty percent to the State General Revenue Fund, forty percent to the Permanent School Fund and ten percent to the Permanent University Fund. The Legislature shall by law make the necessary provisions for carrying out the provisions of this section."

(Sections 2 and 3 have reference to the manner of submitting the proposed amendment to the people for adoption.)

3. *The Occupation Tax.*

This Act has been so recently before the court that it is not repeated here. See *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172.

4. *Extracts from Inaugural Message of Governor Preus to the Legislature of Minnesota January 5, 1921.*

"Tonnage Tax.

* * * * * *

Argument is made that iron ore is a gift of Nature, a natural heritage of the state, a natural resource that is diminished by continued mining, leaving waste land in its wake, that it should therefore take a classification different from other forms of property which are the result of toil and that it should bear a heavier tax than other property in order to meet the depletion and disappearance of such natural wealth.

* * * * * *

* * * While I reiterate that I do not desire to confuse the mind and befog the eye by proposing legislation which would complicate tonnage tax legislation, nevertheless, if a higher tax on such property is justifiable on the ground that the people of the state have a heritage in the iron ore deposits to be found within its borders, then it would seem that at least a part of the proceeds should be regarded as a trust fund and not merely a heritage to those who happen to be living while the iron ore is being taken out of the ground. If it is a heritage, it is a heritage of future as well as present generations."

5. *Extract from Chapter 5 of the Seventh Biennial Report of the Minnesota Tax Commission.*

"Arguments For and Against a Super-tax.

The principal arguments used by the proponents of a super-tax on iron ore may be summarized as follows:

Iron ore being a product of nature, its presence in the ground not being the result of the expenditure of capital or labor, is a natural heritage of all the people, and as such, the people are justified in appropriating to their use, in some form of taxation, some considerable part of the value arising from its exploitation.

That it does not reproduce itself, therefore its value is diminished by use through depletion, and that because of this diminishing value it should bear a heavier tax than other forms of natural property not diminished by use.

That under existing conditions the bulk of this great natural heritage is gradually being removed from the state to enrich other states, and that eventually its value as a taxable state asset will have disappeared through depletion due to shipments, and in its place will be found only valueless 'holes in the ground,' and that for this reason the state is justified in exacting a heavy toll in the form of a super-tax for the depletion and disappearance of its natural wealth.

That a super-tax on profits will insure the state a fairly uniform amount of public revenue annually from mine taxation during the life of mining in the state, while, if it depends on ad valorem taxes only, the receipts therefrom will soon begin to decline, and will reach the vanishing point within a generation.

In answer to these arguments the opponents of a super-tax contend:

That the natural heritage theory has no greater force in its application to iron ore than to other forms of natural wealth.

That if the state has a natural heritage in iron ore, it also has a natural heritage in its quarries, its forests, and its fertile agricultural lands.

That if one form of natural wealth should bear a super-tax because of the heritage theory, then all forms of natural wealth should be subjected to the same tax.

That admitting for the purpose of the point that the heritage argument has some force, it is a heritage of the nation, and not simply a heritage of the people of Minnesota, for the people of this state had no more to do with the placing of iron ore in the ground than had the people of other states.

In answer to the diminishing value argument and the disappearance from the state of its natural wealth the opponents of the supertax contend:

That a part of the ore is converted into other forms of wealth in this state and continues to be a taxable asset of the state.

That the mining of the ore creates other forms of taxable wealth that would not be called into being if we had no ore deposits.

That while at the present time a large part of the ore is shipped out of the state, a considerable part of

it comes back again in manufactured form, and thus again becomes a taxable asset of the state.

That if our natural wealth should be subjected to a heavy supertax because a part of it is being shipped out of the state, then other states would be justified in imposing an equally heavy supertax on coal and other natural commodities shipped into this state, thus adding to their cost; that such a theory is wholly selfish and economically unsound.

That any substantial increase in the present tax burden on mines will tend to discourage the mining industry and to stop explorations for new tonnages, as well as to discourage, if not eventually stop the experiments that are now being carried on at great private cost to render commercially valuable the immense deposits of low grade and magnetic ores known to exist within the state, and that excessive taxation in any form will force mining people to discontinue or greatly curtail their activities, and to direct their attention to the ore deposits of other states or countries in which the mining industry is not burdened with excessive taxes."

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 355

GEORGE L. BURROWS, JR., ET AL.,
PLAINTIFFS AND APPELLANTS,
vs.
SAMUEL LORD, ET AL.,
DEFENDANTS AND APPELLEES.

Appeal from the District Court of the United States
For the District of Minnesota

GROUNDS OF JURISDICTION OF COURT AND JUDGMENT TO BE REVIEWED

This is an appeal from a decision rendered by Honorable William A. Cant, United States District Judge for the District of Minnesota, on January 15, 1925, holding the Act in question to be valid and dismissing the bill of complaint (R. 41-51). The jurisdiction of the Federal Court is based upon the ground that the Act assailed

(Chapter 226 of the Laws of Minnesota of 1923) is obnoxious to the equal protection and due process provisions of the Fourteenth Amendment, and violates Section 10, Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. It is also based on diversity of citizenship, the amount involved being in excess of $3,000.00. The jurisdiction of this Court is invoked under Section 238 of the Judicial Code.

STATEMENT OF THE CASE

The bill was filed in the United States District Court for the District of Minnesota, in Equity, on March 11, 1924, against Samuel Lord, James G. Armson and Odin Halden, constituting the Minnesota Tax Commission; Clifford L. Hilton, Attorney General of the State of Minnesota, Raymond P. Chase, State Auditor of Minnesota, and Henry Rines, State Treasurer of Minnesota, to restrain and enjoin the defendants from carrying out or enforcing the provisions of Chapter 226 of the Laws of Minnesota of 1923 (Royalty Tax Act), and to have said Act adjudged unconstitutional and void, both under the Federal Constitution and the Constitution of the State of Minnesota. The case came to hearing on pleadings and proofs and on January 15, 1925, the Honorable William A. Cant, United States District Judge for the District of Minnesota, dismissed the bill of complaint and held the Act valid. The appeal is from such decision and brings up for review all questions involved, both local and federal. *(Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175.)*

On October 2, 1899, George L. Burrows (now deceased), of Saginaw, Michigan, and Ezra Rust, then of the City of New York but later on of Saginaw, Michigan, each owned an undivided one-half of the surface rights and an undivided one-third of the mineral rights in a certain mine known as the Rust Mine at Hibbing, Minnesota. Gilbert B. Goff (now deceased), of Edenville, Michigan, owned an undivided one-third interest in the mineral rights of said mine (R. pp. 1, 2, 34). On that date Messrs. Burrows, Rust and Goff leased said mine to the Lake Superior Consolidated Iron Mines, a New Jersey corporation, for the period of fifty years and three months from October 1, 1899, granting unto said lessee the right to explore for, mine, take out and ship merchantable iron ore during the period of said lease. The lessee was required to pay to the lessors for all ore mined and shipped during the first three months of said lease, royalty at the rate of 30 cents for each gross ton, and for all iron ore mined and shipped on and after January 1, 1900, the lessee was required to pay to lessors royalty at the rate of 25 cents for each gross ton. The lease also provided that for all iron ore mined and shipped on and after the first day of January, 1900, the royalties shall be due and payable on the 10th days of April, July, October and January in each calendar year, and that payment on each quarter day shall be for the full amount of ore mined and shipped from the said lands during the three months immediately preceding the first day of the month in which the payment shall become due. The lease required the lessee to pay the lessors a minimum royalty of $50,000.00 each year regardless of whether there were 200,000 gross tons of

ore mined and shipped during the year or not. The lessee was required to pay all taxes and assessments, ordinary and extraordinary, general and special, which may be levied or assessed upon the demised lands and on the iron ore mined thereon, etc., and was required not to permit or suffer said lands and property, or any part thereof, to be sold at any time for any taxes or assessments, and contemplated that the royalties shall be net to the lessors (R. pp. 1, 2, 3, 12, 19, 34). The royalty payments were required to be paid at or to George L. Burrows & Company's bank at Saginaw, Michigan, or at and to any other bank in the City of Saginaw, or elsewhere, as the lessors, their executors, administrators or assigns may from time to time designate in writing (R. 16). It was stipulated that the lessors and their successors have never designated any other place than Saginaw, Michigan, as the place for payment of said royalties and all royalties under said lease have been transmitted by the lessee from Minnesota and received by the plaintiffs at Saginaw, Michigan, as provided in said lease, including those for the year 1923 (R. 34). The royalties were required to be paid by the lessee in gold coin of the United States of the present standard of weight and fineness (R. 16). A copy of the lease is attached to the bill of complaint (R. 12-19).

Mr. Burrows died testate at Saginaw, Michigan, on November 9, 1921, leaving George L. Burrows, Jr., Alice B. Beaumont, Elizabeth B. Huntington, Lucy B. Morley, Mary Sage B. Fowler and Edwina B. Montague as his children and sole heirs at law. Each of said children took an undivided one-sixth interest in his es-

tate under his will. George L. Burrows, Jr., and John W. Beaumont are his executors. His said children and executors are and were during the year 1923 all residents of the State of Michigan. Principal admnistration of his estate was had in Michigan and ancillary administration in Minnesota (R. 1-2-34).

Mr. Rust died testate January 3, 1918. At the time of his death he was a resident of Michigan. Principal administration of his estate was had in the Probate Court of Saginaw County, Michigan, and ancillary administration was had in Minnesota. The interest of his estate in said mine, subject to said lease, belongs to Estelle Rust, James G. MacPherson and Charles J. Reynick, as trustees under said will, and to their successors in trust. The said trustees are now, and were during the year 1923, residents of Michigan (R. 1-2-3-34).

Mr. Goff died September 6, 1911. Prior to his death he had conveyed in trust to his son, Ernest A. Goff, an undivided two-ninths interest in the mineral rights in said mine, subject to said lease, and subsequently his said trustee resigned and the Detroit Trust Company of Detroit, Michigan, was duly appointed trustee in the place of said Ernest A. Goff. The beneficiaries under said trust are all residents of the States of Michigan and California and were such in 1923, and the Detroit Trust Company is a resident of Detroit, Michigan (R. 1-2-3-34).

The lease of October 2, 1899, remains in full force and effect and has never been terminated or modified by the parties thereto. The plaintiffs, as successors in title to an undivided eight-ninths interest in said mineral

lands, subject to said lease, have never canceled, modified or extended said lease or granted any rights in said mineral lands, but merely succeeded to the right of their predecessors in title to receive quarterly in Michigan royalties at the rate of 25 cents per gross ton for all iron ore mined and shipped during the preceding quarter (R. 1-2-3).

The Act assailed in this suit (R. 19-22) was approved April 11, 1923, and purports to take effect and be in force from and after its passage, and is as follows:

"CHAPTER 226—H. F. No. 29

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same.

Be is enacted by the Legislature of the State of Minnesota:

Section 1. Tax on iron ore royalties. Rate. —There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

Sec. 2. Definitions.—For all purposes of this act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word 'person' shall be construed to include individuals, copartnerships, associations, companies and corporations.

Sec. 3. Annual reports to tax commission.—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

Sec. 4. Contents of reports.—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.
2. The amount of royalty paid on each tract of land separately.
3. The name and post office address of each person to whom royalty is paid, and
4. Such other information as said commission may require.

Sec. 5. Tax commission to assess tax.—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor

and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. Penalties for non-payment.—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. Date of payment.—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. Tax a lien on lands and ore.—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. Auditor to make draft.—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

Sec. 10. Treasurer to collect tax.—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which

such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11. Penalties for false returns.—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. Records to be open to inspection of tax commission—Violations and penalties.—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. Taxes to be paid into general revenue fund.—All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923."

It will thus be observed that the statute seeks to impose a tax of 6% "upon all royalty received during each calendar year thereafter (after December 31, 1923), for permission to explore, mine, take out and remove ore from land in this state." Section 2 of the Act seeks to define the word "royalty." Section 3 requires annual reports to the Minnesota Tax Commission from persons to whom royalty is paid. Section 4 requires annual reports to the Minnesota Tax Commission from persons paying royalty. Section 5 requires the Tax Commission to determine the amount of the tax due from such persons and to enter the amount in its records and to make its certificate of taxes due thereon from such person and on or before the first day of May of each year file the same with the State Auditor and a duplicate thereof with the State Treasurer. Section 6 provides a penalty of 10% for failure to make the report provided for in Section 3 of the Act. Section 7 provides that the tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and, if not paid on or before that date, a penalty of 10% shall immediately accrue thereon. The law does not provide to whom, in the first instance, the tax shall be paid. Section 8 provides that the situs of royalty for all purposes of this Act shall be in Minnesota, and the tax therein provided for shall be a specific lien from the time the same is due and payable upon the title and interest of the person to whom such royalty is payable, in and to the land. Section 9 provides that on or before the 10th day of June in each year the State Auditor shall make his draft upon each person delinquent in the payment of the tax for the amount of the taxes and penalty or penalties due thereon, and place the same in the hands

of the State Treasurer for collection, etc. Section 10 requires the State Treasurer, within ten days after the receipt of the draft, to notify the taxpayer by mail of the amount thereof and it provides that if the same is not paid within 30 days after presentation, he shall deliver the same to the Attorney General, whose duty it shall be to bring an action thereon in the District Court of Ramsey County for the amount of the draft, together with interest and costs of the proceedings. It also provides that the judgment of the court when so obtained and properly docketed shall be a lien upon all the right, title and interest of the taxpayer to the land upon which the tax is a lien from the time the same is docketed, and that the property may be sold in satisfaction of such judgment in the manner provided by law for the sale of property on execution. Section 11 provides for penalty in case of false returns. Section 12 provides for the inspection of records. Section 13 requires that all taxes under the Act shall be paid into the State Treasury and credited to the general fund. This is the only section which indicates to whom the tax may be paid. The tax is due and payable, under Section 7, on the first day of June in each year and provides a penalty of 10% if not paid on or before that date, but it nowhere states to whom it may be paid prior to the receipt of the draft from the State Treasurer, which draft may not be received by the taxpayer until 20 days after the first day of June.

The tax purports to be imposed upon the act of receiving a certain kind of royalties. It is not imposed upon all royalties which are received, but only upon

those royalties which are received for permission to explore, mine, take out and remove ore from land in Minnesota. This would necessarily exclude royalties received under licenses granted to manufacture or vend a patented article. It would also exclude royalties received on account of copyrighted books, manuscripts, etc. It would also exclude royalties received under leases of all Minnesota lands, excepting ore lands. It was stipulated that the total tonnage of merchantable ore in Minnesota, according to the figures of the Minnesota Tax Commission in 1923, was approximately 1,300,000,000 tons; that a substantial portion of this ore was not under lease (R. 36). The evidence also disclosed that the State of Minnesota owned about 150,000,000 tons of merchantable ore in the state and that a substantial portion of this was under lease on a royalty basis (R. 40). The stipulation also disclosed that there were a number of ore deposits in the state which were not under lease but which were under contract of sale or had been sold outright (R. 36).

There were, during the year 1923, at least four instances in which fee owners other than the plaintiffs operated their own properties and sold the ore produced, without receiving or paying royalties thereon. In the majority of cases mines are operated by lessees, who derive the returns or consideration from the ore produced through mining and selling it, and do not receive any returns through royalties paid to them, and this was true in 1923. The iron ore in the lands of the plaintiffs constitutes the chief value thereof, and in the case of iron ore deposits, as a general rule the entire substantial value thereof consists in the iron ore. During the year 1923 the total amount of royalties received on

iron ore reported to the Minnesota Tax Commission was $16,347,004.22, of which amount approximately $9,538,-157.87 was reported as being received by resident owners and approximately $1,474,150.58 was reported as being received by corporations foreign to the State of Minnesota, the remaining approximately $5,334,701 being reported as received by non-residents of the state. All the known iron mines of the State of Minnesota are in the northern and northeastern part of the state. Many mines have been entirely exhausted, and it is reasonable to expect that others will be exhausted within a comparatively short time after mining operations begin. At various times 243 iron mines have been in operation, of which 45 have been exhausted.

During the year 1923 forty mines of subsidiary companies of a certain corporation were held by them in fee, free from leases, and were not operated. Seven such mines were so held by one of such subsidiaries, which was during said year engaged in mining and is an operating company, and the present intention of said company is to mine said properties and not to lease them. The remaining mines above referred to were, in 1923 and previously, owned in fee by said subsidiary corporations, and prior to 1923 many of such mines were operated by said subsidiary operating company under arrangements between it and said other subsidiary corporations, which arrangements did not in any instance involve the payment of any royalty by said operating subsidiary company to any such owning subsidiary corporations. During 1923 one such mine was operated under such arrangements, and it is the present intention of said corporations to continue said practice

of operating their said mines under the aforesaid arrangements, not involving the payment of royalties.

The State of Minnesota, in December, 1922, had a total of eighty-four mining leases outstanding on a substantial portion of its approximately 150,000,000 tons of merchantable ore. In 1923 the State was paid royalties of approximately $1,955,805.40 on ore owned by it, most of the leases being on a 25-cent royalty basis, and the royalty paid in 1923 represents a tonnage mined on State-owned lands of about 5,000,000 tons for that year. About one-tenth of the known merchantable iron ore of the State belongs to the State of Minnesota. Royalty rates in iron mining leases in Minnesota vary from 12½ cents to $1.25 per ton. It has been the practice in Minnesota for many years to lease real estate and business lots in cities on long-time leases for rentals payable and paid in cash, and this was true during 1923. Upwards of 4,000,000 yards or tons of gravel are used in Minnesota per year, gravel being found in about half of the localities of the State and the greater part of them are leased on a royalty basis, the royalty being from 5 to 25 cents per yard and usually 10 cents per yard or ton, the leases on large gravel pits commonly carrying a minimum payment per year, the method of mining being similar to that of mining ore by open pit operations, there being about 40 large commercial pits in the State. The State itself uses from 500,000 to 1,000,000 tons or yards of gravel per year, about three-fourths of which is leased from private parties upon a royalty basis, and the State holds from 1,500 to 1,800 leases on a royalty basis. The method of operating such gravel pits is substantially the same as that of operating an iron mine where the ore has to be washed. This was true in 1923.

The royalties under these gravel leases are not subject to the Royalty Tax, and no other rents are subject to this Royalty Tax. Forty Minnesota iron mines owned by subsidiary corporations of a certain corporation in fee were held by those corporations free from lease, which mines contained 344,000,000 tons of merchantable ore and which undoubtedly will be mined without payment of royalty (R. 34-41) and (Records pp. 55-56-67-70 in *Royal Mineral Association et al. v. Lord; William E. Boeing et al. v. Lord,* and *Merrimac Mining Co. v. Lord,* which are cases Nos. 388-389-391 on the October term of this court involving many of the questions involved in the case at bar).

Section 1 of Article 9 of the Minnesota Constitution is as follows:

> "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property, and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation, and there may be exempted from taxation personal property not exceeding in value $200, for each household, individual or head of a family, as the legislature may determine: Provided, that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to a cash valuation, and, provided further, that nothing herein contained shall be construed

> to affect, modify or repeal any existing law providing for the taxation of the gross earnings of railroads."

By amendment adopted November 7, 1922, Section 1A was added to Article 9 of the Minnesota Constitution authorizing an Occupation Tax to be laid on the business of mining or producing iron ore or other ores in the State. Said Section 1-A is as follows:

> "Every person, co-partnership, company, joint stock company, corporation, or association however or for whatever purpose organized, engaged in the business of mining or producing iron ore or other ores in this state, shall pay to the state of Minnesota an occupation tax on the valuation of all ores mined or produced, which tax shall be in addition to all other taxes provided by law, said tax to be due and payable from such person, co-partnership, company, joint stock company, corporation, or association however or for whatever purpose organized, on May first of the calendar year next following the mining or producing thereof. The valuation of ore for the purpose of determining the amount of tax to be paid shall be ascertained in the manner and method provided by law. Funds derived from the tax herein provided for shall be apportioned; fifty percent to the State General Revenue Fund, forty percent to the Permanent School Fund and ten percent to the Permanent University Fund. The Legislature shall by law make the necessary provisions for carrying out the provisions of this section."

There is no similar provision contained in the Constitution of Minnesota specifically authorizing the Legislature to impose a tax on royalties derived from the leasing of iron ore or mineral lands.

Section 1993 of the General Statutes of Minnesota of 1923 provides for the classification and assessment of real and personal property as follows:

> "All real and personal property subject to a general property tax, and not subject to any gross earnings or other lieu tax, is hereby classified for purposes of taxation as follows:
>
> *Class 1.* Iron ore whether mined or unmined shall constitute Class One (1) and shall be valued and assessed at fifty (50) percent of its true and full value. If unmined, it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located, other than the ore, shall be classified and assessed in accordance with the provisions of Classes Three (3) and Four (4) as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist, the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately, and the aggregate of the two shall be assessed against the tract or lot."

Class 2. This class includes household goods, etc., and provides that they shall be assessed at 25% of their true and full value.

Class 3. This class includes live stock, stocks of merchandise, unplatted real estate, etc., and provides that they shall be assessed at 33⅓% of their true and full value.

Class 3a. This class includes agricultural products in the hands of the producer, etc., and provides that

they shall be assessed at 10% of their true and full value.

Class 4. This class includes all other property including platted real estate, and provides that such property shall be assessed at 40% of its true and full value.

Section 2337 of the General Statutes of Minnesota of 1923 provides for a specific tax on money and credits, including certain shares of stock in corporations, and in lieu of all other taxes on such property. This Statute reads as follows:

> "As used in this Section, the word 'money' means gold and silver coin, treasury notes, bank notes and other forms of currency in common use; and the word 'credits' means and includes every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due, and all shares of stock in corporations the property of which is not assessed or taxed in this State.
>
> As hereinbefore defined, money and credits are hereby exempt from taxation other than that imposed by this Act and shall hereafter be subject to an annual tax of three (3) mills on each dollar of the fair cash value thereof."

Moneys, annuities, royalities and credits of every kind belonging to inhabitants of Michigan are subject to advalorem or general property taxes under paragraph 4002 of the Compiled Laws of Michigan of 1915, as amended by Act 297 of the Public Acts of Michigan for 1921 and Act 193 of the Public Acts of Michigan for 1925. Said statute is in part as follows:

"For the purposes of taxation, personal property shall include:

1. All moneys;
2. All annuities and royalties;
6. All credits of every kind belonging to inhabitants of this state, whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without the state, except such as are expressly exempted from taxation by law."

ERRORS RELIED ON

The following assigned errors (R. 52-53) are relied on:

1. In dismissing plaintiffs' Bill of Complaint and entering a decree for the defendants.

2. In holding that Chapter 226 of the Laws of Minnesota of 1923 does not violate Section 1 of Article 9 of the Constitution of the State of Minnesota, which requires that taxes shall be uniform upon the same class of subjects.

3. In holding that the tax imposed by said Act is not obnoxious to the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the State the equal protection of the laws.

4. In holding that such tax is not in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall de-

prive any person of property without due process of law.

5. In holding that the tax so imposed does not violate Section 10 of Article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

6. In holding that iron lands under lease may properly be segregated in a special class and a special and additional tax levied thereon, or on the income or receipts therefrom.

7. In holding that the fact that iron lands are being depleted of their natural wealth, furnished any proper basis for classification under which they may be subjected to special and double taxation.

8. In holding that for the purpose of special taxation, it is proper to classify lands according to the form of contract by which they are disposed of or enjoyed.

9. In failing to hold that the tax so imposed, if a tax upon royalty as such distinct and separate from the land, is void, because it attempts to tax property beyond the jurisdiction of the State.

10. In failing to hold that plaintiffs were entitled to the relief prayed for in their Bill of Complaint, and to enter a decree permanently enjoining the defendants from enforcing the provisions of said Act.

11. In holding that, unless the Act in question is invalid as against the Uniformity clause of the State Constitution with reference to taxation, or as against

the Due Process or Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States, it must stand.

12. In holding in effect that a classification is valid if based on the incidents of the ownership of the property taxed rather than on its characterictics.

13. In holding in effect that an otherwise invalid and unconstitutional Act can be held to be valid because of the existence of a prior Act, (Chapter 223 of Laws of Minnesota of 1921).

14. In holding that the fact that other mining properties, not in process of being mined or depleted, are not taxed under the Act, is not important.

15. In holding that the fact that other wasting properties, such as stone quarries and gravel pits or certain lumber areas are not included in the Act, does not invalidate the classification.

16. In holding that a heavier tax may be levied on ore lands which are being depleted, (or on the income or receipts therefrom) than on other ore lands (or on the income or receipts therefrom), or than on other non-ore lands that are being depleted.

17. In holding that under either the 1921 or the 1923 Acts, the tax might have been levied as an Occupation Tax or Income Tax, or a tax on the land as might best give effect to the legislative will.

18. In failing to hold that if it is a tax against the person or an excise or privilege tax, or a tax on income or gross receipts, it is void as to non-residents.

SUMMARY OF ARGUMENT

Subject Matter of the Tax

The tax is new and has no counterpart in the authorities. It is imposed upon all royalty received for permission to explore, mine, take out and removed ore from land in Minnesota. The Trial Court held it to be a tax upon an interest in land.

Taxing Statutes Strictly Construed

Taxing statutes must be construed strictly against the state and liberally in favor of the taxpayer. The nature of the tax and the subject on which it is laid must first be ascertained in order to determine its validity or invalidity. The Act must be strictly construed against the state and liberally in favor of the taxpayer.

Power of a State to Tax is Limited to Persons, Property and Business Within Its Territorial Jurisdiction

The state has no power or jurisdiction to levy a tax excepting against persons, property or business, and such persons, property or business must be within the territorial jurisdiction of the state.

If It Is a Tax Against the Person, It Is Void As To Non-Residents

A state cannot levy a tax against the person of a non-resident. The subject matter of the tax in such case is outside the jurisdiction of the state.

If It Is An Excise, Business or Privilege Tax, It Is Void Because

(1) There must exist a taxable privilege, and receipt of income or royalities is not a taxable privilege.

(2) The taxable privilege, if any, is not one exercised and enjoyed within the territorial jurisdiction of the State. The only privilege exercised and enjoyed by these non-resident plaintiffs is the receipt, in Michigan, of royalities.

(3) The tax is not levied against the beneficiary of the privilege. These non-resident plaintiffs cannot be taxed for a privilege which they never possessed or enjoyed. Permission to mine and remove ore was never granted by them, nor to them. That privilege is enjoyed solely by the lessee.

If It Is a Tax on Real Estate, It Is Unconstitutional and Void

It is not imposed on all real estate, nor on all real estate containing ore, but only on real estate containing ore which is leased on a royalty basis. The classification is arbitrary and is based on the incidents of ownership and not on the characteristics of the property.

If It Is a Tax on Personal Property, It Is Unconstitutional and Void

Royalties received by residents of Minnesota are taxed under the Minnesota Money and Credits Law, and royalties received by residents of Michigan are taxed under the Advalorem Tax Law of Michigan, and to tax them again would be double taxation. As to these non-resident plaintiffs, the money has an actual and

physical situs beyond the jurisdiction of the State. Money as such is not subject to subclassification, and to tax money or credits as such, limiting the tax to money or credits derived as royalties under mineral leases, would be arbitrary discrimination. The selection would be based upon the incidents of ownership rather than upon the characteristics of the property taxed.

If It Is a Tax on Income or Gross Receipts, It Is Unconstitutional and Void

Regarded as a tax on income or gross receipts, the tax would be unconstitutional and void because it is not general or uniform upon all incomes, but arbitrarily selects one isolated source of income or gross receipts and exempts all others. It would not be laid on income derived by virtue of occupation, but entirely by virtue of the ownership of property and, in view of the Uniformity Clause of the Minnesota Constitution and the Equal Protection Clause of the Federal Constitution, it would be just as inadmissible to place a discriminatory and arbitrary tax upon a single item of income as it would be to place such a discriminatory and arbitrary tax upon the property, real or personal, from which it was derived.

The Act Violates the Due Process Clause and Inherent Limitations on the Power to Tax

The Act violates the Due Process Clause and inherent limitations on the power to tax, in that it seeks to tax persons or property beyond the jurisdiction of the State, and also because it is arbitrary selection and not classification, and also because it amounts to double taxation.

ARGUMENT

Subject matter of the tax:

The tax sought to be imposed under this law has no exact counterpart anywhere in the authorities. In so far as we can discover, neither the Federal Government, nor any of the states, have ever heretofore sought to impose a tax solely on rents or royalties received under a mining lease, or solely on rents or royalties received on any other kind of a specific lease. The tax is also unique in that the law is not entirely clear as to what is the exact subject matter of the tax. If we heed the language of the Act, the tax is imposed "upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state." The incidence of the tax, therefore, according to the language of the Act, is the receipt by the taxpayer of royalties of a certain kind, viz., those under ore leases. The law seeks to impose the tax on the act of receiving royalties. Counsel for the State, however, in the trial court, took the position that it was not necessary for the State to determine the nature of the tax, or the subject on which it was laid. It was his position that the tax was related to iron ore and was something which inheres in the ore, or in the lands, and that there was an inseparable relation between what is taxed and the ore. He said you might call it a royalty tax, a severance tax, or a production tax, and that it has some of the incidents of an excise tax, or an income tax. He also stated that it was complementary and supplementary to the Occupation

Tax of 1921. The Trial Court (R. 49) holds that, under either the Act of 1921 or the Act of 1923, the tax might have been laid as an Occupation Tax, or as an Income Tax, or as a tax on the land, and that taken literally the Act of 1923 provides for a tax on royalties. Royalties may be a legislative concept rather than a characterization of the property which is the subject matter of the tax. In any event, the Trial Court did not accept what he deemed the literal interpretation of the Act as imposing a tax on royalties. He held it to be a tax upon an interest in land, in the following language (R. 50):

> "Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid, and it is so considered in the determination of this case."

Taxing statutes strictly construed:

The rule announced by this court in *United States v. Merriam, 263 U. S. 179; 44 Supreme Court Rep. 69,* is instructive on the question of the construction of a taxing statute. The court said:

> "On behalf of the Government, it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. * * *

> (Quoting with approval from *Partington v. Attorney General, L. R. 4 H. L. 100);* 'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

Counsel for the State, in the Trial Court, urged what he deemed to be an equitable construction of the Act, that is, that it must be construed in connection with, and as supplemental to, the Occupation Tax Law. This likewise was the holding of the Trial Court—(R. 46). This amounts to construing the Act strictly against the taxpayer and liberally in favor of the state. The argument assumes that the court can read something into the Act which is contrary to, or in addition to, the words of the statute. Although the language of the Act imposes the tax on "all royalty received," yet the state argues that it may be construed as a severance tax, meaning a tax on the taking of the ore from the ground, or it may be a production tax, meaning a tax on producing ore, or it may be an excise tax, or tax on privilege, or it may be an income tax, or tax on net or gross

income, or it may be a tax relating to, or inhering in ore, meaning, we presume, a tax on ore after it is removed from the ground and is ready for shipment. We submit that counsel cannot speculate as to the subject matter on which the tax is laid, nor the place where that subject matter is located, nor read into the Act a meaning beyond the words of the statute itself. Neither can the Act be sustained as an indefinite drag-net to bring within its provisions anything which might be deemed to be royalty received. The Act must stand or fall upon its own verbiage. As to non-residents, the subject taxed being royalties received outside of Minnesota, the Act cannot elsewhere determine that what is received outside of the state is in fact received within the state for purposes of taxation. The Act must be strictly construed against the state. The court cannot amend the Act, nor extend its provisions by implication. *United States v. Isham, 84 U. S. 504; Gould v. Gould, 245 U. S. 153; United States v. United Verde Copper Co., 196 U. S. 215; United States v. George, 228 U. S. 22; Disston v. McClain, 77 C. C. A. 342 and 207 U. S. 587; Smietanka v. First Trust and Savings Bank, 257 U. S. 602, 42 Supreme Ct. 223.*

It is apparent, therefore, that the court must construe this Act strictly against the state and liberally in favor of the taxpayer and, with that rule as a guidance, must determine the nature of this tax and the subject on which it is laid, in order to determine its validity or invalidity. This is true because the court must needs determine whether the subject matter of the tax is one upon which any tax can be laid at all and, if so, whether or not such subject matter is within the territorial jurisdiction of the state.

The power of a state to tax is limited to persons, property and business within its territorial jurisdiction:

Cooley on Taxation, Second Edition, page 21, lays down the rule as follows:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, etc."

The same rule was laid down in *Tappan v. Bank, 19 Wallace, 490 at p. 499,* as follows:

> "The power of taxation by any state is limited to persons, property or business within its jurisdiction."

In *Dewey v. Des Moines, 173 U. S. 204,* the rule was laid down thus:

> "The power to tax is, however, limited to persons, property and business within the state, and it cannot reach the person of a non-resident."

In *Union Transit Co. v. Kentucky, 199 U. S. 195,* the rule was laid down as follows:

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."

The *Transist Company case, supra,* involved the validity of a Kentucky statute which sought to impose a

tax on personal property of persons residing in that state, whether the personal property was located in Kentucky or elsewhere. The Transit Company was domiciled in Kentucky but owned tangible property permanently located in other states. The court held that the Kentucky statute was invalid in so far as it attempted to impose a tax on personal property permanently located in other states.

In *Michigan Central Railroad v. Powers, 201 U. S. 245,* (quoted with approval in *Shaffer v. Carter, 252 U. S. at page 52),* the following rule is laid down:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business."

The case of *Helen C. Frick v. Pennsylvania,* decided by this court June 1, 1925, *45 Supreme Court Rep. 603,* involves the validity of certain provisions of the Pennsylvania Inheritance Tax Law. That law sought to impose a tax on the transfer of personal property from the decedent, whether located in Pennsylvania or elsewhere, and the first question was as to the validity of the law imposing a Pennsylvania transfer tax on tangible personal property located in New York and Massachusetts. On this question, this court said in part:

> "This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution.
>
> These decisions show, first, that the exaction by a state of a tax which it is without power to

impose, is the taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra-territorial operation; and, thirdly, as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state regardless of the domicile of the owner.

The application to the states of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and, therefore, it is impossible for one state to reach out and tax property in another without violating the Constitution, for, where the power of the one ends, the authority of the other begins.

The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner. * * * But to impose either tax, the state must have jurisdiction over the thing that is taxed and, to impose either without such jurisdiction, is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts."

It, therefore, appears from the foregoing authorities that, unless the subject-matter of this royalty tax is persons, property or business within the territorial jurisdiction of Minnesota, the statute is unconstitutional and void. We will, therefore, consider whether this tax is imposed upon persons or property, or upon business, and whether the subject-matter is within the territorial jurisdiction of Minnesota, and whether it violates the equal protection clause and due process clause, or the uniformity clause and is discriminatory and void.

If it is a tax against the person, it is void as to non-residents:

The plaintiffs in this case are all non-residents of Minnesota. It was admitted by the State on the argument in the Trial Court that if the tax was against the person, or a tax on money after it is received, then the State would have no jurisdiction. The State even went further and admitted that it could not get a personal judgment against a non-resident in a suit to recover the tax, even though it got personal service upon the non-resident within the state. The reason for this rule is that the subject-matter of a tax against the person is the person himself and, if such person is a non-resident, the subject-matter of the tax is not within the jurisdiction of the State.

In the *Des Moines case, supra,* the Supreme Court of the United States held unconstitutional a statute of Iowa which sought to create a personal liability against a non-resident to pay a paving tax assessed against property belonging to such non-resident within the State of Iowa.

In *Re: Maltbie, 223 N. Y. 227 (119 N. E. 389)*, the —court held that a New Jersey corporation, which was doing business in the State of New York, could not be held personally liable for a tax assessed against the capital of a corporation engaged in business in New York. The court also said:

> "The State may provide for the sale of the property upon which the assessment is made, but it cannot, under any guise or pretense, proceed further and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident so far as his personal liability is concerned, would amount to the taking of property without due process of law and would be a violation of the Federal Constitution."

In the case of *New York v. McLean, 57 App. Div. 601* (affirmed in *170 N. Y. 374; 63 N. E. 380)*, the Court held that a non-resident owner of stock in a national bank located in New York, was not personally liable for the tax assessed against his shares.

In the case of *Bristol v. Washington County, 177 U. S. 133*, the question was not as to the personal liability of the owner, but as to the liability of her property which was situated in the State, to the tax.

In *Pendleton v. Commonwealth, 110 Va. 229; 65 S. E. 536*, it was said that the State has no jurisdiction to assess a tax as a personal charge against a non-resident.

Shaffer v. Carter, 252 U. S. 58; 40 Supreme Court Rep. 222, relied upon by defendants, was a suit by a resident of Chicago to restrain the State Auditor of Oklahoma and Sheriff of Creek County, Oklahoma, from

levying upon and selling plaintiff's oil and gas property in that State to satisfy a tax assessed against him on account of income which he derived in 1916 from the business of operating such oil and gas wells. The Constitution of Oklahoma expressly authorized an Income Tax Law. The law was general and applied to all incomes, with certain exemptions and deductions. The income derived by Shaffer was from a business conducted in Oklahoma. As to the nature of the liability, this Court, page 59, said:

> "The entire jurisdiction of the state over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction *in rem*, etc."

In the *Shaffer* case, *supra*, therefore, the tax was levied on account of income derived by the plaintiff from business conducted in Oklahoma. This Court did not hold that the non-resident was personally liable for the tax and the tax was not in fact levied against the person. The jurisdiction asserted was one *in rem* against the property.

Cooley on Taxation, Fourth Edition, at page 220, says:

> "At any event a non-resident cannot be made personally liable for a tax on his property within the state."

The same author, at page 222, says:

> "A state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state,

> than it can subject all the citizens or all the property of such other state to its power."

We, therefore, submit that if this is a tax against the person it is void as to these non-resident plaintiffs, because the state has no jurisdiction to levy a tax against the person of a non-resident. The subject matter of the tax in such case is outside the jurisdiction of the state.

If this is an excise, business or privilege tax, it is void:

An excise tax or privilege tax is sometimes referred to as a tax upon business and may take the form of an occupation tax, or a tax upon the exercise of some taxable privilege within the state. An excise tax is not a tax upon property. In *Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 11 A. L. R. at page 304,* the Court said:

> "Practically all courts and text-writers are agreed that an excise tax, being a tax on business or occupation, however measured, is not a tax on property."

The Federal Estate Tax is a tax upon the privilege of transferring property from the dead to the living. Most of the state inheritance tax laws are taxes on the privilege of the living receiving inheritances from the dead. The Minnesota Occupation Tax of 1921 was sustained by this Court in *Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 Supreme Court Rep. 528,* as a tax upon the occupation of mining ore in the State of Minnesota, the tax being measured by a percentage of the value of the ore mined and produced during the preceding year, less certain deductions. This Court at page 176 said in part as follows:

> "We think the tax in its essence is what the Act calls it—an Occupation Tax. It is not laid on the land containing the ore nor on the ore after removal, but on the business of mining the ore, etc."

The Trial Court held in substance that iron ore or iron ore that was being depleted and transported beyond the limits of the State and lost to the State as a source of substantial revenue, could be separately classified for purposes of taxation. Elsewhere in this brief we argue that, if the basis of the classification is the fact that natural resources are being depleted and removed from the State and will be lost to the State as a source of revenue, as held by the Trial Court, all such natural resources so being depleted and removed must be brought within the class. It would not be within the constitutional powers of a state to make a sub-class of natural resources which are being depleted and removed, and include in such subclass only iron ore, and then make a sub-class of that sub-class and include therein only such iron ore as was being mined under a lease on a royalty basis. Such sub-classification would be clearly predicated on the incidents of ownership or form of disposal and not on the characteristics possessed by the property. The Trial Court (R. 47) held:

> "The basis of classification which may be invoked in support of Chapter 226, is the circumstance or condition that, of necessity, the lands to which the Act applies, in the course of their development as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration. The desire of the Legislature was to reach the inter-

ests involved in property of that class and apply thereto a special tax."

In the foregoing, the Trial Court clearly goes on record as holding that the basis of the classification is the fact that certain natural resources will be depleted in value and ultimately lost to the State as a source of substantial revenue, and that the desire of the Legislature was to reach the interests involved in property, meaning, we presume, a tax against property, to-wit, iron ore that was being depleted and removed from the State. The Trial Court then argues that, having ascertained the class, to-wit, iron ore which is being depleted and removed from the State, the State can apply to such class or sub-class a special tax, and that a portion of this tax may be imposed under the Occupation Tax Law of 1921 and the remaining portion under the Royalty Tax Act of 1923; that the latter Act is complementary and supplementary to the former and taxes the untaxed portion at six percent. The Trial Court (R. 46) held:

> "Without doubt, when the Legislature of 1923 met and considered problems of taxation, it knew of Chapter 223, Laws of 1921. *State v. Klasen, 123 Minn. 382.* That Act was presumably valid. On its face, it pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of six percent. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The Legislature found this latter class already carved out by the earlier Act. In 1923, the general purpose apparently was to assure the State a return of a full six percent, less certain minor deductions,

on the value of all ore mined and brought to the surface of the earth. And the further general purpose apparently was to adjust this burden equitably as between the two classes of interests concerned in the operation where the mine was being operated by a lessee. One of these classes, represented by the operator, was specified in *Chapter 223, supra,* and the tax burden by that Act was imposed thereon. The other interest, represented by those receiving royalties, was specified in Chapter 226, Laws of 1923, and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter. In the consideration of this case, it is neither possible, nor proper to divorce entirely the two acts which have been referred to. Either separately, or together, they indicate the policy of the State with reference to the taxation of the interests therein specified."

We submit that this holding of the Trial Court is unsound for the following reasons: (a) If the basis of the classification is the fact that natural resources are being depleted and removed from the State or lost to the State as a source of revenue, then all such natural resources must be brought within the class, and a sub-classification could not be made of iron ore so being depleted and a special tax imposed thereon, while exempting all other natural resources so being depleted and removed from the State; (b) If, however, natural resources so being depleted and removed from the State could be sub-classified and a special tax imposed only on iron ore so being depleted and removed from the State, then it is manifest that a further sub-classification could

not be made of that sub-class and include therein, for the purposes of the Royalty Tax, only such iron ore as is being mined on a royalty basis, while exempting therefrom all other iron ore; (c) While it is true that this Court, in the *Oliver Iron Mining Co. case, supra,* reserved decision on the validity of the Occupation Tax Act as affecting operating fee owners and held the Act valid only in so far as it affected operating lessees, yet the Act purports to impose the occupation tax on all engaged in the business of mining ore. The Royalty Tax Act imposes the tax only on royalties received by lessors or other similar interests. Therefore, the latter Act is not complementary to the former. The identification of the interest taxed under the Occupation Tax Act is based upon the fact that the taxpayer is engaged in the business of mining ore in Minnesota, whether as lessee or as fee owner, whereas, the identification of the interest taxed under the Royalty Tax Act is the fact that the lessor is receiving royalties under a lease. It cannot be successfully argued that the occupation tax reaches a certain part of an identified interest and the Royalty Tax Act reaches the residue of such part, because the identification of the interest taxed under the Occupation Tax Act is based upon the circumstance of the taxpayer being engaged in the business of mining ore, whereas, the basis of the identification of the interest taxed under the Royalty Tax Act is the circumstance of the taxpayer having received royalties under a lease; (d) This Court has already held that the occupation tax is not a tax against property, but a tax imposed upon an occupation, to-wit, the business of mining the ore. If it is argued that the Royalty Tax Act is a

tax imposed upon a part of the same occupation or business of mining ore, then we submit that it cannot be sustained as proper classification, because the taxpayer, under the Royalty Tax Act, is not engaged in any business and is not exercising any taxable privilege within the State of Minnesota, and a tax could not be imposed upon him on account of the business or privilege exercised by his lessee. Furthermore, the business or privilege exercised by the lessee, to-wit, that of mining ore, could not be split up and parceled out and a part of the tax imposed upon the lessee who is solely and exclusively engaged in the business, and a part of the tax imposed upon the lessor who is in no sense engaged in the business; (e) If the Royalty Tax Act is held to be a tax not on business, occupation or privilege, but one levied against property, then clearly the sub-classification would be invalid and the Royalty Tax Act could not be said to be complementary to the Occupation Tax Act. The one Act would not in any sense tax the untaxed portion under the other Act. If the interest taxed under the two Acts is ore being depleted and removed from the State, then the tax would not be uniform upon the same class of subjects, because the subject taxed under the occupation tax is entirely different from the subject taxed under the Royalty Tax Act. The subject taxed under the Occupation Tax Act is the business or occupation of mining iron ore and, if the Royalty Tax Act is a tax imposed upon property, the subject taxed under it would be property and not occupation or business. If it could be successfully argued (which we deny) that these two Acts, when tied together, would not do violence to the uniformity clause, if each tax was imposed upon the

same class of subjects, it manifestly could not be further contended that they would still be valid if one imposed the tax on an occupation or business and the other on property. The Consitution requires uniformity on the same class of subjects.

It is undoubtedly true, as stated in the Occupation Tax case, that the legislature of a State may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. However, aside from the question of improper classification, there are three fundamental requisites to the validity of any excise or privilege tax, as follows:

(1) There must exist a taxable privilege;

(2) The taxable privilege must be one exercised and enjoyed within the territorial jurisdiction of the state;

(3) The tax must be levied against the beneficiary of such priviledge.

We will test this Act by these three standards:

(1) *There must exist a taxable privilege; and receipt of income or royalties is not a taxable privilege.* It will not be seriously controverted that if the tax is one on privilege, there must exist a privilege to be taxed. A privilege cannot exist merely as a legislative conception, but it must exist as a fact, to be taxable, and it must be enjoyed and exercised in order to be taxable. In fact the doctrine of benefits received is the basis of all taxing statutes. If there is no taxable res there obviously can be no tax. The question naturally arises

—what, if any, taxable privilege exists in the case at bar? The law itself does not answer the question. It seeks to impose the tax on royalties received. We submit that the mere receipt of royalties or income from property does not of itself constitute a taxable excise or privilege. In *26 Ruling Case Law, Sec. 209,* at page 236, the author (citing *Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429,* and *Brushaber v. Union Pacific Railroad Co., 240 U. S. 236)* lays down the rule as follows:

> "The mere right to own and hold property cannot be made the subject of excise, and since the right to receive income from property is the chief attribute of ownership, the act or privilege of receiving income from property cannot be made the subject of an excise."

Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 41 Sup. Ct. Rep. 272, involved the constitutionality of an Act passed by the Legislature of Kentucky in 1920. This Act imposed upon every person engaged in the business of manufacturing whiskey or in the business of owning and storing the same in bonded warehouses within the State what was called an "annual license tax" of 50 cents a gallon upon all whiskey either withdrawn from bond, or transferred in bond from Kentucky to a point outside that State. The question was as to whether, as to such, this 50 cents a gallon tax is an occupation tax or is a property tax. This Court held it was a tax on property and not uniform on all property of the same class, and hence was invalid under the State Constitution. In determining the real subject matter on which the tax was laid, the following language of this Court at page 292 is instructive, viz.:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents and obviously it has none of the ordinary incidents of an occupation tax. * * * But, as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession, absolute or qualified, for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping for future consumption or sale. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right, is to tax the value. To levy a tax by reason of ownership of property is to tax the property.' "

The right to use property in one of the only ways in which it can be used, is essential to the property right itself. The land itself is taxed in the first instance. To paraphrase the language of Justice Brandeis in the *Kentucky* case above cited, the whole value of the land depends upon the owner's right to put the land to the only use of which it is capable, of extracting the ore. To levy a tax by reason of the ownership of the property is to tax the property itself. This, we submit, is what, in the present instance, the tax does. In other words, there is no taxable privilege which can be separated from the right of ownership to the property.

We submit, therefore, that this tax cannot be sustained as an excise, privilege or business tax because of the mere receipt of royalties themselves as income.

(2) *The taxable privilege must be one exercised and enjoyed within the territorial jurisdiction of the state.* The nature of these mining leases and the royalties derived therefrom has been determined by this Court and by the Supreme Court of Minnesota and the Supreme Court of Michigan in various cases, only a few of which it will be necessary to cite. In *State v. Royal Mineral Association, 132 Minn. 232, 156 N. W. 128,* the Supreme Court of Minnesota refused to sustain a tax on royalties as credits. The Court among other things said:

> "Having determined that the unaccrued payments on these leases are rents, the remaining questions are easy of solution. If these amounts are rents, we are unable to distinguish them from any other ground rents. If these rents, while not yet due, are taxable as credits, then all other unaccrued ground rents are so taxable. Unaccrued rents are not personal property. They are incorporeal hereditaments. They are an incident to the reversion and follow the land. * * *
>
> Our conclusion is that unaccrued rents are real estate; that they are taxed under our tax laws by taxation of the real estate and they are not taxed as personal property and are not to be listed or taxed as credits."

The defendants relied upon the following language in the opinion in the Royal Mineral Association case, viz.:

> "It is not controverted that the Legislature could impose a tax upon these rents or royalties in addition to the general tax upon the land."

The authority of the last quoted statement is challenged upon the following grounds, namely: (a) This

ness in Minnesota. They are not exercising any taxable privilege in Minnesota. Their connection with this real estate consists solely in the receipt by them in Michigan of royalties or rents on account of the mining and shipment of ore by the lessee from their lands in Minnesota. We submit that the only privilege exercised and enjoyed by these plaintiffs in connection with these lands (and which is not a taxable privilege) is the receipt in Michigan of these rents or royalties. The Act makes the receipt of these rents or royalties the taxable *res*. Therefore, the act upon which the tax is imposed is an act performed and consummated outside of the territorial jurisdiction of Minnesota. The defendants, however, argued that the law fixes the *situs* of these royalties for the purpose of the act in the State of Minnesota, under Section 8 of the law which provides that "the *situs* of royalty for all purposes of this Act shall be in this State." Defendants rely on *Savings Society v. Multnomah County, 169 U. S. 421*, as sustaining the right of the State to fix the *situs* of property for purposes of taxation. A study of this case will show that it does not sustain the contention. That case involved the validity of a statute of Oregon imposing a tax on mortgages secured by real estate situated within the State of Oregon, whether the mortgage was owned by residents or non-residents. However, under the law of that State, mortgages were deemed and treated as real estate. The property taxed, therefore, had a *situs* within the jurisdiction of the taxing State.

The defendants also cited the case of *Shaffer v. Carter, 252 U. S. 38, supra.* That case involved the validity of the Oklahoma Income Tax Law as applied to the

income derived by a resident of Chicago from his oil business in Oklahoma. The taxpayer was conducting a business in Oklahoma which constituted a taxable privilege and the law was sustained, it being a general Income Tax Law. Defendants also cited the case of *Travis v. Yale and Towne Manufacturing Co., 252 U. S. 60.* That case involved the validity of the New York Income Tax Law and it was held invalid in so far as it discriminated between residents and non-residents in the matter of exemptions. This Court, however, recognized the doctrine that the power to impose the tax against a non-resident taxpayer was based upon income derived from a business, trade, profession or occupation carried on within the State; in other words, income derived from the exercise within the State of a taxable privilege. This Court said:

> "That the State of New York has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the State, etc. * * * is settled by our decision in *Shaffer v. Carter*, this day announced, involving the Income Tax Law of the State of Oklahoma."

After the amendment to the New York Act, eliminating the discrimination, the case went to the Court of Appeals of New York and is reported as *People ex rel Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109,* and was sustained in so far as it imposed an excise tax upon the business carried on in that state. The court among other things said:

"The tax imposed by the Act of 1919 upon and with respect to the net income from every business carried on in this State by persons not residents of the State, is not for the privilege of carrying on a legitimate business within the boundaries of the State, for that is a privilege granted by the Federal Constitution. It is the imposition of a tax upon business done by a non-resident in this State no greater in any respect than the tax imposed upon the conduct of such a business by a resident of the State. It is measured by a percentage of the net income from the business. Such a tax is just and constitutional. The authority of the State to lay a tax is necessarily dependent upon jurisdiction of the subject of the tax. Its jurisdiction as far as it affects the relator, is over the business done by him in this State. * * * As we have already shown, a non-resident has a constitutional right to engage in legitimate business in the State. The tax is not for a privilege already constitutionally provided, but to cast upon non-residents a just proportion of the expenses of protecting residents and non-residents in business in this State. That expense should be borne by the persons enjoying such protection. It is a tax upon business done in this State, first levied in 1920, but measured by the net income of a designated period and notwithstanding its imposition, the relator, as a non-resident, enjoys the same privileges and immunities as residents of the State and his constitutional rights are protected."

The cases cited by the defendants are commented on to show that they are not authority for the doctrine that the State can fix the *situs* of property (for taxation purposes) which may be located outside of the State, and further to show that in each case the actual *situs*

of the thing taxed was within the jurisdiction of the taxing State. The authorities are clear that the State cannot arbitrarily declare that certain property or privileges outside of the State exist within the State for taxing purposes. The State could not impose a tax on real estate located outside of its boundaries. The *Union Transit Company case, supra,* is authority for the rule that the State cannot tax tangible personal property permanently located in other states, even though the statute so declares it taxable. For the same reason it must be apparent that the State could not tax a privilege which was exercised and enjoyed outside of the State. The only privilege which this Act seeks to tax is the receipt of royalties and that act arises outside of the State of Minnesota. The State would have no jurisdiction over the thing that is taxed. This court, in the case of *Frick v. Pennsylvania, supra,* held the Pennsylvania Statute, imposing a tax on the transfer of personal property located in other states, unconstitutional because the State had no jurisdiction over the thing taxed. This court said:

> "The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts."

The State cannot by legislative fiat declare that the *situs* of an act which is done outside of the State is in

fact within the State. If the State could do that, then it could declare that the *situs* of all real estate located in Wisconsin was, for purposes of taxation, located in Minnesota, or that all tangible personal property located in Wisconsin was, for purposes of taxation, location in Minnesota. The legislative declaration as to *situs* must accord with the facts, otherwise it is abortive. These plaintiffs, in receiving royalties in Michigan, are not exercising any taxable privilege within the State of Minnesota.

(3) The tax must be levied against the beneficiary of such privilege. Assuming (but denying) that there is a taxable privilege exercised in Minnesota, the tax, to be valid, must be levied against the beneficiary of such privilege. These plaintiffs could not be taxed on account of a privilege exercised and enjoyed by their lessee or by other persons. If it is claimed that the making of the lease was a taxable privilege, it may be answered (a) that the Act does not seek to impose a tax on the making of the lease and (b) that the privilege of making the lease was parted with by the predecessors in title of the plaintiffs in 1899 and never was granted or exercised by these plaintiffs, and (c) a retroactive excise tax imposed in 1924 on the making of a lease in 1899 would violate the due process clause and would impair the obligation of contracts in contravention of Section 10 of Article 1 of the Constitution. These plaintiffs never executed a lease of these ore lands. Clearly they could not be taxed on account of a privilege parted with by their predecessors in title upwards of twenty-six years ago. If it is claimed that the permission to mine and remove ore is a taxable

privilege, the answer is (a) that the Act does not purport to impose a tax on such privilege and (b) that this was a privilege which was parted with by plaintiffs' predecessors in title upwards of twenty-six years ago, and is not now and never was enjoyed by these plaintiffs. In any event, these plaintiffs are not the beneficiaries of such privilege. They have no right to mine and remove ore from this land and never had such right, and never granted such right. It would be the taking of property without due process of law, and denying to them the equal protection of the laws to impose a tax on them on account of a privilege which they never possessed and which is enjoyed by their lessee.

If this is a tax on property it is unconstitutional and void:

We will discuss this question under three headings as follows:

(1) As a tax on real estate it is unconstitutional and void;

(2) As a tax on personal property it is unconstitutional and void;

(3) As a tax on income or gross receipts it is unconstitutional and void.

(1) *As a tax on real estate it is unconstitutional and void.* We have already shown that, under the authorities, the interest of these plaintiffs in this mineral land subject to lease is real estate. The defendants in the Trial Court declined to state upon what they claimed the tax was imposed, but they contended that it was

related to iron ore. The Trial Court (R. 50) held that "it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case." The tax must be imposed on either persons, property or business, and the subject matter of the tax, whether it be persons, property or business, must be within the territorial jurisdiction of the State. There can be no such a thing as a valid tax unless it is imposed on some one of these three classes of taxable subjects, and it is not valid then, unless the subject matter of the tax is within the territorial jurisdiction of the State. If it is imposed on property, it must be either on real estate or personal property. If this royalty tax is imposed on real estate, then we submit that it is unconstitutional and void because it denies the plaintiffs the equal protection of the laws within the meaning of the Fourteenth Amendment and is not uniform on the same class of subjects within the meaning of the Minnesota Constitution. It appears that mining lands in Minnesota are already overtaxed, because their value for taxation purposes is 50% of the actual value, while the highest valuation of any other property is 40%. In view of the fact that all real estate, including ore lands, is thus taxed under the general tax laws of the State, it would not be competent for the Legislature to impose an additional tax upon certain ore land in the shape of a royalty tax, while exempting all other lands from the tax and also exempting a large portion of the ore lands. Regarded as a tax on real estate, it is void because it is not uniform upon the same class of subjects. It is not levied against all real estate but only an isolated kind of real estate, to-wit, ore lands;

it is not imposed upon all ore lands but only upon those under lease; it is not imposed upon all ore land under lease, but only upon those ore lands under lease where the lessee is operating the mine or paying royalties; it is not imposed upon all ore lands under lease where the lessee is operating or paying royalties, but only upon those ore lands operated under lease where the lessor is not the State. In other words, if this tax is imposed upon ore lands, the basis of the selection is the incidents of its ownership and not the characteristics possessed by the property. Property cannot be classified for purposes of taxation on the incidents of its ownership. *Cooley on Taxation, Fourth Edition, page 718,* says:

> "So property must be classified by the characteristics possessed by it and not by the incidents of its ownership."

See also *Southwestern Bell Telephone Co. v. Middlekamp, 1 Fed. Rep., 2nd Series, 563.*

The classification adopted must be germane to the purpose of the law. *Wagner v. Milwaukee County, 112 Wis. 601, 88 N. W. 577.*

As was stated in *Commonwealth of Pennsylvania v. Alden Coal Co., 251 Pa. 134,* the right of classification is allowed in order to avoid or correct inequalities, never to create them.

In *Southern Railway Company v. Greene, 216 U. S. 412,* the rule was laid down as follows:

> "The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was

> designed to prevent any person or class of persons from being singled out as a subject of discriminating and hostile legislation. * * * Arbitrary selection cannot be justified by calling it classification."

If this is a tax against real estate, it is not only a double tax, but it is a most discriminating and unjust tax. It is double in that the real estate (ore lands) already is burdened with an unjust portion of taxes under the general law, being taxed at a higher rate than any other property in the State; it is discriminatory in that it singles out one isolated group of owners of land and imposes the tax on them while exempting all others. It exempts all agricultural lands; it exempts all residence property; it exempts all business property; it exempts all mining lands, excepting ore lands, and it exempts all ore lands, excepting those under lease on a royalty basis, and it exempts all those under lease on a royalty basis, excepting those which are being operated, or where the lease requires a minimum annual royalty, and it exempts those which are being operated under leases granted by the State. This arbitrary, discriminating classification could not be sustained on any theory. If we regard this as a tax on land, it is difficult to appreciate upon what theory an added tax can be imposed upon ore land and not imposed on other lands, but if it is claimed that the classification might go that far, then it is more difficult to appreciate upon what theory ore lands being mined could be subjected to the tax, while all ore lands not being mined would be exempt. But if it is claimed that the classification might go that far, then it is inconceivable that a further classification might be made so as to impose the tax only on ore lands

operated under lease, while exempting all other ore lands and all other real estate. It is only under leases that royalties are paid. We then reach the point where the classification is based solely on the incidents of ownership rather than on the characteristics possessed by the property. Ore lands being operated possess the same characteristics as ore lands not being operated, and ore lands operated under a lease possess the same characteristics as ore lands being operated by the fee owner. Regarded as a tax on real estate, the incidence of the tax is made to depend solely on whether the ore lands are operated under lease on a royalty basis, or where the lease requires the payment of a minimum annual royalty.

The Trial Court (R. 46-49) argued that practically all of the iron ore that is mined in Minnesota is being transported beyond the limits of the State and that great natural wealth, which serves as the basis of taxation, is annually being withdrawn therefrom, and that of necessity the revenues of the State will be substantially affected thereby. From this he deduces the conclusion that it was the policy of the State to impose an added tax on ore lands because they are being depleted in value and ultimately will be lost to the State as a source of substantial revenue. The Trial Court held that the desire of the Legislature was to reach the interests involved in property of that class and apply thereto a special tax. It seems to us that this reasoning is faulty and unsound for several reasons. Our search of the authorities has failed to reveal a case anywhere in the books where the Courts have justified a classification for purposes of taxation based solely on the ground that

the property taxed was being depleted, removed beyond the limits of the state and would ultimately be lost to the state as a source of revenue. As was held in the *Union Transit case, supra,* some benefit to the property taxed is a controlling consideration in classifying property for taxation. Property that is being depleted or transported beyond the limits of the state does not receive any special benefit not common to all other property. It would be a very dangerous doctrine, indeed, for the courts to declare that an added tax could be imposed on property simply because it was being depleted or being removed beyond the boundaries of the state. The Legislature does not possess an unlimited power to tax, nor unlimited power to classify. *Cooley on Taxation, Fourth Edition, page 396,* says:

> "An unlimited power in the Legislature to make any and everything lawful which it might see fit to call taxation would, when plainly stated, be unlimited power to plunder the citizen."

The classification adopted must be germane to the purposes of the law and must be based on some difference which bears a just and proper relation to the attempted classification.

Wagner v. Milwaukee Co., 112 Wis. 601, 88 N. W. 577.
Commonwealth of Pa. v. Alden Coal Co., 251 Pa. 134, 96 Atl. 246.
Gulf, etc., v. Ellis, 165 U. S. 150.
State v. Parr, 109 Minn. 147, 123 N. W. 408.
State v. Ins. Co., 145 Minn. 231, 176 N. W. 756.

Classifying property by the criterion of whether it is being depleted and removed beyond the limits of the

state, is not classifying it by its characteristics; it is classifying it by its ultimate disposal or destination. If the state has the power to say that certain property shall be subjected to a special and added tax simply because it is being depleted and removed beyond the limits of the state, then, indeed, a new and a dangerous power is recognized in the states. It is new because no justification for it is found anywhere in the cases. It is dangerous because of the hardship and discrimination which may result therefrom, and because it does violence to the doctrine that benefits received must be a controlling consideration in the classification. If the doctrine announced by the Trial Court is sound, then a special tax may be imposed on all agricultural products which are being removed beyond the limits of the state, while exempting all other agricultural products. So also a special tax might be imposed on forest products which are being removed beyond the limits of the state, while exempting all other forest products. So also a special tax might be imposed on any other commodity which was being removed beyond the limits of the state, while exempting all other commodities not so removed. If, however, a classification could be predicated on the fact that commodities were being depleted and removed beyond the limits of the state (which is denied), then manifestly the classification to be valid must be based on all commodities so being depleted and removed beyond the limits of the State; otherwise the classification would be arbitrary discrimination. If depletion and removal from the State is a proper basis of classification, then obviously all taxable property being depleted and removed from the limits of the State must be put within the class. Clearly the basis of the classifi-

cation must be consistent and the classification must include all within the class. It would not be competent for the State to bring within the class certain commodities which are being depleted and removed from the State and exclude all others. If the policy of the State and the purpose of the law is to impose a special and added tax on property because it is being depleted and removed from the State, then that purpose must apply to and comprehend all property within the class. A law which predicates the classification on the fact that the property is being depleted and removed from the State but only brings within the class one isolated kind of property that is so being depleted and removed from the State, while excluding all others, could not be sustained on any theory. It would be arbitrary selection and not proper classification.

Justice Mitchell, in *Johnson v. St. Paul & Duluth Railroad Company, 43 Minn., p. 222,* said:

> "It has been sometimes loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions."

Regarded as a tax on real estate, it is not a tax on all real estate in Minnesota. It is not a tax on all real estate in Minnesota containing iron ore. If it is a tax on real estate, it is only levied on such real estate as contains iron ore where the iron ore is leased on a royalty basis and the mine is being operated or the lessor

is receiving royalties. Section 1993 of the general statutes of Minnesota of 1923 imposes a general property tax on such real estate as contains iron ore. The Royalty Tax Act, therefore, if considered as a real estate tax, attempts to impose a special and additional tax on part only of the real estate containing ore and this without any reference to the characteristics possessed by such property. The imposition of the special tax is made to depend solely on the incidents of ownership, that is, whether the ore land is under a lease on a royalty basis and the lessor is receiving royalties. The statute imposes the special tax on the fruits or proceeds of the ore land if leased on a royalty basis, and exempts such proceeds when the real estate is not leased. It also exempts such proceeds when they are obtained through either a sale of the ore land as such, or a sale of the ore land subject to the lease, or where the ore is mined by the owner of the fee, or where the proceeds are received by the state under a lease of its own lands. The State of Minnesota owns in fee about 150,000,000 tons of ore or upwards of one-tenth of the merchantable ore of the State. This special tax, therefore, is levied not because of any differences in the subject on which it is imposed and similar property on which it is not imposed, but solely because of the difference in the form of the sale or disposal of the ore and, therefore, is a tax not on a class of subjects, but rather on a specific form of disposal of ore. The evidence (R. 36) disclosed that in 1923 there was approximately 1,300,000,000 tons of merchantable ore in place in the State. And that subsidiary corporations of a certain corporation held in fee, and free from lease, 344,000,000 tons of such ore, and this ore will doubtless be mined without the payment of royalties and, therefore, not subject to this special tax.

Therefore, one company and its subsidiaries own in fee, and not subject to lease, approximately one-fourth of the total ore in the State. This will all escape the royalty tax. The Act, therefore, is a clear and hostile discrimination against these plaintiffs whose ore lands were under long-time leases 24 years before the Act took effect.

A law which taxes certain leased mineral lands but exempts all unleased mineral lands and all leased mineral lands where the lessee is not paying royalties, is arbitrary discrimination. Property cannot be so classified for purposes of taxation. Such a classification is based upon incidents of ownership rather than upon differences in characteristics of the taxed and untaxed property. To impose an additional and special tax upon leased ore lands where the lessee is paying royalties is to impose a double tax upon it and renders the taxation not uniform upon the same class of subjects,—there being no difference in the character of the ore lands in the two cases. The leased ore lands require no greater protection from the State, receive no greater benefits from it and there is no reason why they should contribute to its revenue in a greater degree than unleased ore lands from which no royalties are derived.

Congress may pass a valid tax law which is not uniform on the same class of subjects, providing it has territorial uniformity. But a tax law passed by the State, under the equal protection clause of the Fourteenth Amendment and the uniformity clause of the Minnesota Constitution, must be uniform on the same class of subjects. *Knowlton v. Moore, 178 U. S. 41; Flint v. Stone, Tracy Co., 220 U. S. 107.*

The State in the Trial Court relied on *Oliver Iron Mining Co. v. Lord, 262 U. S. 172,* as sustaining the right of classification. This Court there was dealing with an occupation tax and not with a tax on real estate. Therefore, if this royalty tax is regarded as a tax on real estate, it cannot be claimed to be complementary or supplementary to the Occupation Tax Act, and it cannot be claimed that the tax is uniform on the same class of subjects on the theory that the Royalty Tax Act taxes the untaxed portion under the Occupation Tax Act. To have uniformity, both taxes would need to be levied on the same class of subjects. Furthermore, this Court has not yet passed upon the validity of the occupation tax as affecting a fee owner mining his own property. If this Court should ultimately hold the Occupation Tax Act void as to the fee owner mining his own property, then clearly such ore would escape both taxes. There would be no occupation tax imposed upon such fee owner mining his own property because the law as to him is void, and there would be no royalty tax imposed because the ore land was not under lease and no royalties were paid or received.

The cases of *Thompson v. McLeod, 112 Miss. 383, 73 Southern 193, and Thompson v. Kreutzer, 112 Miss. 165, 72 Southern 891,* are instructive on the question of the limitation of the power of a State to impose such a special tax. In the McLeod case the Court held invalid a statute of that State imposing an additional tax of ¼ of 1 cent on each cup or box of turpentine extracted from standing trees. It appeared that the taxpayer who owned his own turpentine distilleries and the trees which produced the resin, paid an *ad valorem* tax upon

the land and standing trees, and also a privilege tax for the right to manufacture or distill spirits of turpentine. The additional tax of ¼ of 1 cent on each box was held to be an additional burden of taxation operating directly upon his property and unconstitutional and void.

We, therefore, submit that, regarded as a tax on real estate, it is unconstitutional and void under both the Federal and State Constitutions because (a) it is not imposed on all real estate; (b) it is not imposed on all real estate containing ore; (c) it is not imposed on all real estate containing ore but only on real estate containing ore which is leased on a royalty basis; (d) it may be imposed on real estate which does not contain ore, providing such real estate is leased on a royalty basis under a minimum clause and is not being operated. The tax in such instance is imposed regardless of whether ore exists. (e) It does not classify real estate by any single characteristics pertaining to lands as such, but purely based on incidents of ownership and, therefore, the tax is not uniform on any class of real estate; (f) it imposes the tax on the proceeds of ore lands when leased but it exempts such proceeds when not leased but obtained through (1) a sale of the fee; (2) a sale of the lease; (3) a mining and sale of the ore by the owner; (4) receipts by the state on a lease of its lands. (g) This special tax, therefore, is imposed not because of any inherent differences in the class of the subjects taxed and those not taxed, but solely because of the form or manner of disposal of the subject, and is a tax not on a class of subjects, but on the form or manner of disposal of one subject, namely, the leasing of ore lands. (h) Regarded as a tax on real estate, it is a clear arbitrary and

hostile discrimination between particular persons and classes.

(2) *As a tax on personal property it is unconstitutional and void.* If this is a tax against personal property it must be a tax either against money and credits, or it must be a tax against the ore after its removal from the ground and before it is shipped out of the State. The defendants admitted in the Trial Court that as against non-resident plaintiffs, it could not be sustained as a tax either against money or against credits. When the tax is imposed the credit has disappeared and has become money in the hands of the lessor outside of the jurisdiction of the State, and no valid personal tax could be imposed against a non-resident plaintiff. Regarded as a tax on money as such, the class is incapable of further subdivision. Money could not be classified for purposes of taxation in such wise as to impose the tax on money in hand derived from a certain source, while exempting from the tax all other money in hand derived from other sources. Any valid tax on money would have to be uniform on all money. It would be arbitrary and unreasonable discrimination to attempt to classify dollars once received according to the source from which they came.

Royalties received by residents of Minnesota are taxed under Section 2337 of the General Statutes of Minnesota of 1923, being the Money and Credits Law, the same as all other money of residents. Royalties received by residents of Michigan are taxed as money or credits as the case may be, under paragraph 4002 of the Compiled Laws of Michigan of 1915 as amended by Act

297 of the Public Acts of Michigan for 1921 and Act 193 of the Public Acts of Michigan for 1925, the same as all other money or credits of residents of Michigan. For Minnesota to again tax such royalties received as money or credits would, as to residents of Minnesota, not only be double taxation but would violate the constitutional requirement of uniformity on the same class of subjects and would, as to residents of Michigan, not only be double taxation and violate the constitutional requirequirement of uniformity on the same class of subjects, but would be a tax beyond the jurisdiction of the State to impose.

The case of *State v. Royal Mineral Association, 132 Minn. 232,* held that, under the Money and Credits Law, the unaccrued royalties not due when the money and credits tax is levied constitute a part of the real estate and the real estate, having once paid the ordinary *ad valorem* tax, is exempted from any further tax such as a tax on money and credits. The same case, however, held that when royalties do mature, they then become personal property and taxable under the Money and Credits Law as such. In the case at bar, the royalties received are not only due and payable but have actually been paid before the tax is imposed. At such time they have become money in the hands of the lessor and in the case of Minnesota residents, are taxed as such money under the Money and Credits Law and, as to residents of Michigan, they are taxed under the Michigan statute referred to imposing an ad valorem tax on all moneys and credits. Therefore, this Royalty Tax Law, as to residents of Minnesota, is unconstitutional under the uniformity clause of the State Constitution and the equal

protection and due process clauses of the Federal Constitution and, as to residents of Michigan, the tax is unconstitutional for the same reasons and for the additional reason that the money is beyond the jurisdiction of the State and is not subject to taxation by Minnesota. Royalties considered as moneys and received by a nonresident outside of the State certainly have their *situs* where received by the creditor. Royalties whose *situs* is beyond the jurisdiction of the State cannot be brought within the State by any mere statutory declaration. A statutory declaration cannot establish a *situs* within the State for property whose actual and legal *situs* is outside of the State. Section 8 of the Royalty Tax Law reads:

> "The situs of royalty for all purposes of this Act shall be in this State."

We submit that this section of the law is abortive and void. The *situs* of such royalties as moneys received, not only legally but physically and actually is outside of the State and at the domicile of the lessor, and the State could no more bring such royalties within the State by legislative declaration than it could bring within the State real estate or tangible personal property for purposes of taxation. The jurisdiction of the State to tax stops at the State boundary. As this Court said in the *Frick case, supra:*

> "It is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends, the authority of the other begins."

Either the person or the property or business taxed must be within the jurisdiction of the taxing state, otherwise the tax is illegal and void.

We have already shown that, regarded as a tax on credits, the tax would be illegal double taxation because, as to residents of Minnesota, it would already be taxed under the Minnesota Money and Credits Law, and, as to residents of Michigan, it would be taxed under the Michigan Money and Credits Law. We have also shown that when the royalty tax is imposed the credit has disappeared and has become money in the hands of the lessor.

Therefore, regarded as a tax on money or credits, this Act is unconstitutional and void because (a) as a tax on money, the thing taxed not only has a legal but an actual and physical *situs* beyond the jurisdiction of the State; (b) regarded as a tax on money, the classification is arbitrary and illegal because money as such is not subject to sub-classification for purposes of taxation. Either all money must be taxed or none can be taxed. (c) The legislative declaration that the *situs* of royalties received as moneys is within the State is abortive, and the State cannot, by legislative declaration or fiat, bring within the State that which is legally, actually and physically beyond the jurisdiction of the State. (d) Because, regarded as a tax on either money or credits, it would be illegal double taxation,—the money or credits being taxed as such as to residents of Minnesota under the Money and Credits Law of that State and as to residents of Michigan under the Money and Credits Law of Michigan; (e) because as a tax on money or credits as such, the imposition of the tax would be based upon the incidents of ownership or the source from which the money or credit sprang, rather than from its characteristics and hence would be arbitrary discrimination.

It remains, therefore, to be considered whether the tax is imposed on the ore after removal from the ground and before shipment from the State. The Act does not *pro forma* impose the tax on the ore, but the defendants in the Trial Court contended that there is an inseparable relation between what is taxed and the ore. If it is claimed that the tax is on the ore after its removal from the ground, then we submit that the Act is unconstitutional and void because it amounts to a denial of the equal protection of the laws and is not uniform on the same class of subjects. If it is a tax on the ore after removal from the ground, it will be obvious that there will be no legal basis for the classification made by the law. Assuming that there might be brought within the class, ore only, and excluding therefrom all other minerals such as sand, gravel, stone, etc., it would follow that the class could not be further narrowed. The validity of such a law and classification would depend upon all ore removed from the ground being subject to the tax. If this tax is on ore removed from the ground, then it obviously exempts from its burdens all the ore removed by operating fee owners. There would be no basis for a classification which would impose a tax on ore removed by lessees but exempting from the tax ore removed by operating fee owners. If the tax is on ore removed from the ground, then it would be imposed on ore removed by lessees, but would not be imposed on ore removed under contracts of sale, because the payments received under such contracts are not royalties received. There would be no basis for a classification which would impose the tax on ore removed by a lessee while exempting from the tax ore removed by a vendee

under a contract of purchase. If the tax is on ore removed, it would be imposed on ore removed by lessees under leases from private ownership but would not be imposed on ore removed under leases made by the State. There would be no basis for a classification which was based on ore removed under leases from private owners while exempting from the tax all ore removed under leases from the State. The case of *Heisler v. Thomas Colliery Co., 260 U. S. 253, 43 Supreme Court Reports, 84,* relied upon by the defendants, is not authority for the validity of this tax as against ore removed. That case involved the validity of the Act of 1921 of Pennsylvania, which imposed a tax of 1½% on the value of each ton of anthracite coal mined, washed or screened or otherwise prepared for market in the Commonwealth. The tax was not imposed on bituminous coal. The tax was imposed when the coal was ready for shipment or market. This Court sustained the law. The *Heisler* case is an extreme case and no doubt carries the doctrine of classification to the limit. However, in that case it was disclosed that there were a great many differences between the geological formation, chemical context, attributes and uses of anthracite and bituminous coal. This Court said:

> "The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated and the extent of their use. They are, therefore, incentives to industries that the State in

> natural policy might well hesitate to obstruct or burden, and to yield to the policy or consider it is well within the concession of the power of the State expressed in the cases we have cited."

The tax, in that case, was imposed upon all anthracite coal mined, washed or screened and ready for shipment or market. An entirely different question would have been before the Court had the tax been imposed only on anthracite coal which was mined under a lease and had the law excluded therefrom all anthracite coal mined by operating fee owners, and had further excluded therefrom all coal mined under contracts of sale of coal in place, and had further excluded therefrom all anthracite coal mined under certain leases, such as State leases, etc. It is inconceivable that if the Pennsylvania law had been thus narrowed down and only imposed the tax on a certain portion of anthracite coal, based upon the incidents of its ownership, this Court would have sustained the law. The law was sustained because there were certain basic distinctions between anthracite coal and bituminous coal which made the classification proper. Those distinctions had to do with the basic characteristics possessed by the two kinds of coal, and had nothing whatever to do with the incidents of ownership. There was not only a difference in name but a difference in the chemical composition and uses of the two kinds of coal, which gave a basis for the classification. Clearly there is no such distinction in the case at bar. Ore mined under a lease has precisely the same basic characteristics as ore mined by operating fee owners. The only difference between the two is that in the one case the lessee acquired title to the ore by virtue of a lease, and in the other case, the operating fee owner

acquires title by virtue of a deed or other instrument. We, therefore, submit that if the tax is upon ore, or upon ore land, there is no basis whatever, either in reason or in the authorities, for the classification.

(3) *As a tax on income or gross receipts, it is unconstitutional and void.* If this is a tax on income or gross receipts, it is unconstitutional and void, because if we were to admit the power of the Legislature under the Constitution of Minnesota to pass a general income tax law, yet it would have no power to pass a law taxing an isolated and specific source of income, while exempting all others. There is no provision in the Constitution of Minnesota expressly authorizing a tax on incomes. There is a very grave doubt about whether the State would have the power to pass an income tax law in the absence of express constitutional authority. However, if the State of Minnesota has the power to pass an income tax law in the true sense, that is, as distinguished from a tax on business or occupations, it would be bound to make the tax a uniform one under the State Constitution, income as such being the subject of the tax. About fifteen of the states now have income tax laws. In nearly all of them, express constitutional authority exists for the passage of the law. In the case of *Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 11 A. L. R. 302,* the income tax law of that state was held unconstitutional on the ground that it contravened a provision of the Alabama Constitution which prohibited the Legislature from levying in any one year a greater rate of tax than 65/100ths of 1% of the value of the taxable property within the State and the Alabama Income Tax was imposed on property. The Court said:

> "It is interesting to observe that in all of those states, excepting Georgia and Missouri, where a graduated or unequal tax has been laid on incomes, express authority is found therefor in their constitutions, side by side with the general provisions for uniformity or equality. We mention among others Kentucky, Massachusetts, Oklahoma, South Carolina and Wisconsin."

It is to be remembered that we are not dealing with the case of an excise tax upon incomes derived from employments, occupations or exercise of privileges, or whatever might be denominated as a tax on business. We are dealing with the tax, from the standpoint of an income tax, as one laid upon income derived not by virtue of occupation but entirely by virtue of the ownership of property. In the face of such a provision as that contained in the Constitution of the State of Minnesota requiring uniformity, and of the equal protection clause of the Federal Constitution, it would be just as inadmissible to place a discriminatory and arbitrary tax upon a single item of income as it would be to place a discriminatory and arbitrary tax upon the property, real or personal, from which it was derived. The arguments which we have adduced with respect to the uniformity of the tax considered as a tax upon real estate or considered as a tax upon personal property are equally applicable to the tax considered as an income tax.

No state has had the temerity to pass an income tax law which was directed against an isolated source of income while exempting all others. In *Cooley on Taxation, Second Edition, page 28*, the author states:

> "Taxes on incomes may be on all incomes, or on all with such exemptions as will enable the

> taxpayer, in a frugal manner, to support himself and his family."

Defendants in the Trial Court relied on *Shaffer v. Carter, 253 U. S. 37, supra.* We have already commented on that case. The plaintiff owned oil and gas wells in Oklahoma which he operated and from which he derived an income. He was a resident of Chicago, and a tax under the Oklahoma Income Tax Law was imposed on the profit which he derived from this business conducted in Oklahoma. It was a general income tax law and was adopted pursuant to a provision in the Oklahoma Constitution authorizing an income tax. There is, we believe, no doubt about the power of a state, under proper constitutional authority, to pass a general income tax law which will require the payment of an income tax by a non-resident on account of profits derived from a business conducted within the limits of the taxing state. That is all that was involved in the *Shaffer* case, and if anything more is claimed for the decision in that case, it is pure dictum. This Court in the Shaffer case said:

> "And we deem it clear upon principle as well as authority that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein; enforcing payment so far as it can by the exercise of a just control over persons and property within its borders."

Defendants in the Trial Court also relied on *Atlantic Coast Line Railroad Co. v. Doughton, 262 U. S. 413, 43*

Sup. Ct. Rep. 621. That case involved the validity of the income tax law of North Carolina, which was a general income tax law and was adopted pursuant to a constitutional amendment. Taxpayers, for the purpose of the law, were divided into three classes, namely: individuals, ordinary corporations and public service corporations. The plaintiffs were railroad companies owning and operating lines within the state. The law was held valid. The principal question in the case was whether the law was a burden on interstate commerce, and this Court held it was not. The other question was the validity of the classification, and this Court held the classification valid. But the classification was sustained because it was laid upon the receipts derived from the business of public service corporations and it was pointed out that the differentiation complained of resulted from the difference in the subject of the tax (p. 424).

With respect to the application of the provision of the State Constitution requiring uniformity of taxation upon the same class of subjects, reference may be made to the case of *Parker v. North British and Mercantile Insurance Co., 42 La. Annual 428, 7 So. Rep. 599,* which involved the validity of a law of Louisiana imposing a tax on individuals, corporations, etc., of foreign countries doing insurance business in that state. The tax was to be imposed upon the capital of the insurance company at the place in the State where the company had its principal office but, if the capital was not taxed and paid in any other state, then the tax was levied upon the gross receipts, etc. The Court, in holding the law invalid, among other things said:

"Then the question simply stated is whether a property tax levied on the gross receipts of a limited and particular class of persons and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that all property shall be taxed in proportion to its value would seem peremptorily to settle this question. If gross receipts be property subject to taxation, the gross receipts of all or of none must be taxed. It is vain to call gross receipts capital. They are not capital or capital stock, and no legislative declaration can make them so. The only class of taxes under which this can possibly fall is that of an income tax. It is not necessary for us to decide whether or not, under the Constitution, the Legislature has power to levy an income tax. It suffices to say that if the Legislature had such power, it would be an indispensable condition of its exercise that a tax should embrace the income of all persons not exempted; and whatever power of classification the Legislature might possess as to the subject matter of the taxation, that power could, under no pretext, be stretched so as to embrace the right to single out a particular class of taxpayers and to require them to pay such a tax while exempting all others. This is what the Legislature has attempted to do in this instance, and we are bound to hold that it cannot be constitutionally done."

Regarded as an income tax, there is another objection to this law in that it is imposed on all royalties received and not on the portion of them which might be regarded as income. A substantial portion of these royalties is a return of capital because of depletion of the ore deposits. Therefore, if it is claimed that the law

imposes a tax on income, it is invalid in that it is actually imposed on both capital and income. The foregoing authorities establish the rule that even though a State may have the power to pass a general income tax law, yet it would have no power to pass a law imposing a tax on a single source of income or gross receipts while exempting all others. Those cases which sustain the validity of a gross receipts tax for the privilege of doing business and in lieu of other taxes, have no application. They are sustained, first, on the ground that they are imposed upon the exeise or privilege of doing business measured by gross receipts, and, secondly, on the ground that they are in lieu of all other taxes. The tax imposed upon these royalties is not in lieu of all other taxes and is not on the privilege of doing business. If this tax can be sustained, then there is no apparent limit to the power of a state to select the subjects of taxation and to indulge in hostile and unreasonable discrimination.

Furthermore, this Royalty Tax Act was not designed to be, and is not in fact, a tax on income as such. It differs from both the Federal and State Income Tax Laws in many respects. All of the Income Tax Laws, both State and Federal, are general Income Tax Laws, and the tax under them is imposed on all net income with such exemptions and deductions as are reasonable. This law singles out one isolated source of income or gross receipts and imposes the tax on that while exempting all others. Furthermore, both the Federal and State Income Tax Laws impose the tax entirely upon net income and not at all upon capital. This court in *Eisner v. Macomber, 252 U. S. 189* said:

> "Income may be defined as the gain derived from capital, from labor or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."

This statute does not purport to tax the gain derived from the lessors' interest in these mineral lands. It taxes both the gain, if any, and the capital interest. A large portion of these royalties received by the lessors is depletion or a return of capital. It is true that such royalties have been treated by this court to be rentals under the Excise Tax Law of 1909, but they are rentals only in the sense that they are the price or compensation which the lessee pays the fee owner for the right to remove ore. All of such rent is not necessarily income and certainly not under the present Federal Income Tax Law, or the State Income Tax Law. Under the Federal Income Tax Law the fee owner, who leased his mine prior to March 1, 1913, can deduct from his royalties received a reasonable allowance for depletion, based upon the March 1, 1913 value. This was a recognition by Congress of the fact that a part of such royalties is a return of capital.

Suppose that these plaintiffs, at the time this law was passed, had sold their interest in this mine, subject to the lease, at a valuation which would fairly reflect the then present worth of the future royalties. The proceeds of such sale would be a capital return,—the consideration received for a conveyance of their interest in the mine. None of such proceeds would be taxable under the Royalty Tax Act. Intrinsically such proceeds would be a return of capital in the same sense that these royalties are a return of capital. Suppose

again that at the time this law was passed a mine was under lease and the interest of the lessors, subject to the lease, was sold to third parties for a consideration of $500,000.00, and supposing that thereafter the purchasers received as royalties between the time of the purchase and the exhaustion of the mine $700,000.00: In the case stated, it is quite obvious that the gain to the purchasers would only be $200,000.00 and hence the entire $700,000.00 would not be income. Five hundred thousand dollars of the sum received would be a return of capital, yet the entire amount received as royalties would be taxed under this law, both capital and income. These illustrations might be multiplied and they are persuasive that the law was not designed to be, and is not in fact, an income tax law whether tested by its practical operation or in comparison with other income tax laws. It is, therefore, submitted that as a tax on income or gross receipts, it is unconstitutional and void because (a) it is not a general income tax law; (b) It applies to only one isolated source of income while exempting all others; (c) The imposition of the tax is made to depend not on the characteristics of the income but on the source from which it proceeds; (d) The imposition of the tax is made to depend not on whether gain is derived from the mining or disposal of ore by the owner, but upon whether gain is derived upon the disposal of ore under a lease on a royalty basis; (e) The imposition of the tax is made to depend on the incidents of ownership or form of disposal and not upon the characteristics of the property or proceeds taxed; (f) It is not uniform upon the same class of subjects in that it exempts all income, excepting rents and it exempts all rents, excepting those received as royalties

under a lease of ore lands; (g) The tax is imposed upon capital as well as income and hence is not an income tax and is not uniform; (h) It is a hostile and arbitrary discrimination between sub-classes and persons.

The Act violates the due process clause, and inherent limitations on the power to tax:

The defendants in the trial court contended that the Legislature of Minnesota had full and complete power to enact any tax law within the scope of its imagination, subject only to the limitation that the tax shall be uniform on the same class of subjects. This argument did more credit to the zeal than it did to the calm judgment of the defendants. There are, of course, many limitations upon the power of a state to enact tax laws other than the one that they shall be uniform upon the same class of subjects. There are certain inherent limitations upon the power of the state to pass tax laws such as, (a) that the tax must be for a public purpose and not for a private purpose; (b) that the subject matter of the tax must be within the jurisdiction of the state; (c) that the tax cannot be imposed by arbitrary and oppressive methods; (d) that the tax cannot make unjust and illegal discriminations; (e) that the tax cannot be imposed on Federal agencies. The first four limitations enumerated above might be treated as inherent limitations, or as limitations under the due process clause, but they are none the less limitations on the power of the state to tax. To the extent that the law seeks to impose a tax on property or rights which have no business *situs* within the State, it violates the due process clause. If this is a tax on privilege, then the mere receiving of royalties is not a taxable

privilege and in any event is not a privilege exercised within the State of Minnesota, and a tax sought to be imposed on property beyond the limits of the State, or on privilege exercised beyond the limits of the State, violates the due process clause. In *Looney v. Crane Co. 245 U. S. 183*, the Permit and Franchise Tax Acts of Texas were held invalid by this court on the ground that they taxed property and rights wholly beyond the confines of the State and hence constituted the taking without due process. This court held that the operation and effect of a taxing statute may be such as to render the statute invalid under the due process clause, even though on its face the statute is not repugnant thereto.

The trial court (R. 45) held that the equal protection clause of the Fourteenth Amendment does not prohibit double taxation by the states. Double taxation by the states is not prohibited by the equal protection clause of the Fourteenth Amendment, but it is prohibited by the due process clause of the Fourteenth Amendment and by the general doctrine of inherent limitations upon the power to tax. The tax imposed by this Act is, we believe, double taxation within the meaning of the authorities which hold that such taxation is prohibited. *Cooley on Taxation*, Fourth Edition, page 475, says:

> "Direct duplicate taxation, and by this is meant double taxation in the strict legal sense of the term, means taxing twice for the same purpose in the same year some of the property in the territory in which the tax is laid, without taxing all of it a second time; and such taxation is invariably condemned and without regard to the abstract rules hereafter stated as to the validity of double taxation, has seldom if ever been upheld by the courts in a particular case."

The same author at page 482 says:

> "Moreover, notwithstanding express declarations of some of the courts that double taxation is not illegal unless prohibited by the Constitution, it is doubtful if any court at any time, except in a very few isolated cases, has refused to uphold an attack on a tax as double taxation where the tax is double within the strict meaning of the term, since such a tax would be invalid, it is submitted, if for no other reason, because constituting a taking of property without due process of law.
>
> In fact most of the decisions assume without discussion that doubt taxation, using the term in its strict legal sense, is invalid without reference to any constitutional provisions."

The same author at page 498 says:

> "Where double taxation, strictly speaking, is forbidden, it often occurs that certain instances thereof are so flagrant as to require little or no argument to show their invalidity. For instance, where particular property is assessed as real property, it cannot, of course, be again assessed by the same taxing power as personal property. So the State is not entitled to double taxes on the same land under the same title. So taxation of land with its riparian rights precludes separate taxation of the riparian rights."

The same author at page 500 says:

> "Taxation of the same thing under different names is none the less double taxation."

The foregoing rules are recognized by the Supreme Court of Minnesota. In *State v. Northern Pacific Ry. Co., 130 Minn. 377, 153 N. W. 850,* the court said:

> "Defendant contends that because these services are included in the freight charges of the other railway lines, upon which charges a gross earnings tax is paid, to compel it to pay a tax on these same receipts would be in the nature of double taxation, exacting the commutation taxes on the same property twice. This cannot lawfully be done."

In the above case the court quoted with approval from *State v. Railway Co. 30 Minn. 311, 15 N. W. 307* as follows:

> "Exacting three percentum upon the rent paid the company and also upon the receipts by the tenant earned by operating the railroad, would be to the extent of the rent, in the nature of double taxation or rather of exacting twice the commutation for taxes on the same property."

So it was held in *Shibley v. City of Rome, 107 Ga. 384, 33 S. E. 398,* that a vendor of land cannot be taxed on both the land sold and the proceeds of the sale, whether in cash or notes.

In *Scully v. People, 104 Ill. 349,* it was held that where land is assessed for taxation as such, it is not competent at the same time to assess for separate taxation, rents which are to accrue thereafter from the same land, since rent to grow due is part of the land itself, an incident of it, and would, therefore, be included in the assessment of the land.

Kennard v. City of Manchester, 68 N. H. 61, 36 Atl. 553, it was held that if property was leased and the lessee pays the tax on the property pursuant to agree-

ment, it is obnoxious double taxation to impose a tax on the lessor on a sum which placed at interest would produce an income equal to the annual rent. The only case we can find opposed to this view is *Woodruff v. Oswego Starch Co. 177 N. Y. 23, 68 N. E. 994.* That case cannot be regarded as authority because the validity of the statute and the tax was unnecessary to a decision of the case. The only question involved in the case under the stipulation of counsel was as to whether the plaintiff or the defendant should pay the tax and the stipulation did not raise any question as to the validity of the tax. Land had been conveyed by plaintiffs to defendants, reserving a perpetual rent and with a covenant on the part of defendants to pay certain taxes. The City of Oswego, under a statute empowering it to do so, made an assessment upon the interest of the plaintiffs in the leases as personal estate at a gross valuation. The plaintiffs refused to pay and the tax was collected by the enforced levy and sale of defendants' property. The defendants deducted the taxes so paid from rents falling due and the suit was brought to recover rents due. While the court presumed to pass on the validity of the law, yet it said:

> "I very much doubt that the question of the constitutionality of the law has been raised in this case. The terms of the submission do not seem to present it and the City of Oswego was not made a party."

In so far as this *Woodruff case,* by way of *dictum* or otherwise, holds this New York tax law valid in a suit by the lessor against the lessee to recover rent, it cannot be regarded as authority and the dictum is opposed to the rule laid down in other cases. The court too was

concerned with a statute imposing a tax on all rents reserved in all leases in fee, and not with rents reserved under a particular kind of leases, such as leases of iron ore, and hence the *dictum* does not touch the question of arbitrary discrimination, lack of uniformity, etc., involved in the case at bar.

We submit that the State, having levied an *ad valorem* tax on the ore land, it would be obnoxious double taxation to impose another tax upon the owner of the land on account of the receipt of royalties under a mineral lease. To tax the receipt of the royalties is to tax the property itself. Two taxes are imposed in the same year upon the same property for the same purpose. The vice in the tax consists not alone in the fact that a double tax is imposed on the same property in the same year and for the same purpose, but rather in the fact that one isolated sub-class of property is selected as the object of this tax, while exempting all others. The imposition of the double tax is made to depend not on the characteristics of the sub-class, but on the incidents of ownership or the form of disposal of the property and the receipt of the proceeds. The Mississippi Court said in *Thompson v. McLeod, 112 Miss. 391:*

> "If then you tax the lease itself with an *ad valorem* tax and at the same time exact tribute from the lessee in laying the axe to the tree, it is a case of double taxation pure and simple. There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an *ad valorem* tax and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the tree, the state is imposing double taxation upon the tree itself."

We, therefore, submit that this Act violates the due process clause and inherent limitations on the power to tax, and is double taxation because (a) the subject matter of the tax is not within the jurisdiction of Minnesota; (b) the Act makes unjust and illegal discriminations between persons and classes; (c) double taxation is prohibited by the due process clause of the Fourteenth Amendment; (d) a double tax is imposed upon the interest of these plaintiffs in this mine in the same year, on the same property and for the same purpose; (e) this double tax is imposed not on all ore land, but only on ore land under lease on a royalty basis; (f) the imposition of the double tax is made to depend not upon the characteristics of the property taxed, but upon the incidents of ownership or the form of disposal and receipt of the proceeds.

CONCLUSION

It is, therefore, respectfully submitted that the trial court erred in dismissing the bill of complaint; that the act assailed in this suit violates the uniformity clause of the Minnesota Constitution and the due process clause, the equal protection clause and the impairment of obligation clause of the Constitution of the United States; that it violates inherent limitations on the power of the state to tax; that the subject on which the tax is laid is vague and indefinite; that taxing statutes should be strictly construed against the state and liberally in favor of the taxpayer; that so-called equitable constructions are not admissible and an otherwise invalid

act cannot be held valid because it is claimed to be complementary or supplementary to another act; that regarded as a tax against the person it is void as to non-residents on jurisdictional grounds; that regarded as an excise tax it is invalid because the receipt of royalties is not a taxable privilege and is not exercised and enjoyed in Minnesota; that the making of a lease in 1899 could not be taxed retroactively in 1924; that regarded as a tax on real estate it is invalid because it is discriminatory and not proper classification in that the class being ore lands, all within the class are not taxed, but only those ore lands under lease on a royalty basis where the mine is being operated or royalties are paid; that the classification made by the Trial Court cannot be sustained because all natural resources being depleted and removed from the state and lost as a source of revenue are not taxed but only certain ore lands under lease on a royalty basis; that regarded as a tax on personal property it is invalid for similar reasons,—as a tax on money or credits the state would have no jurisdiction to tax and as a tax on ore removed it would be arbitrary discrimination and improper classification to tax ore removed under a lease on a royalty basis and to exempt all other ore; that regarded as a tax on income or gross receipts it is discriminatory and void in that it is not a general income tax but singles out one isolated source of income or receipts and taxes it while exempting all others and also taxes both capital and income; that it is double taxation in that a special tax is imposed on ore lands under lease on a royalty basis in addition to general taxes on the land while exempting

all other lands including all other ore lands from the special tax; that the act assailed makes unjust and illegal discriminations and should not be sustained.

All of which is respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1925

No. 390

ROBERT B. WHITESIDE, W. J. CONAN,
ELIZA CONAN, THE SHAWMUT COMPANY,
ROUCHLEAU-RAY IRON LAND COMPANY,
Appellants,

vs.

SAMUEL LORD, J. G. ARMSON AND ODIN HALDEN,
Constituting the Minnesota Tax Commission;
CLIFFORD L. HILTON,
Attorney General of Minnesota;
R. P. CHASE,
Auditor of Minnesota; and
HENRY RINES,
Treasurer of Minnesota,
Appellees.

Appeal from the District Court of the United States
for Minnesota

BRIEF FOR APPELLANTS

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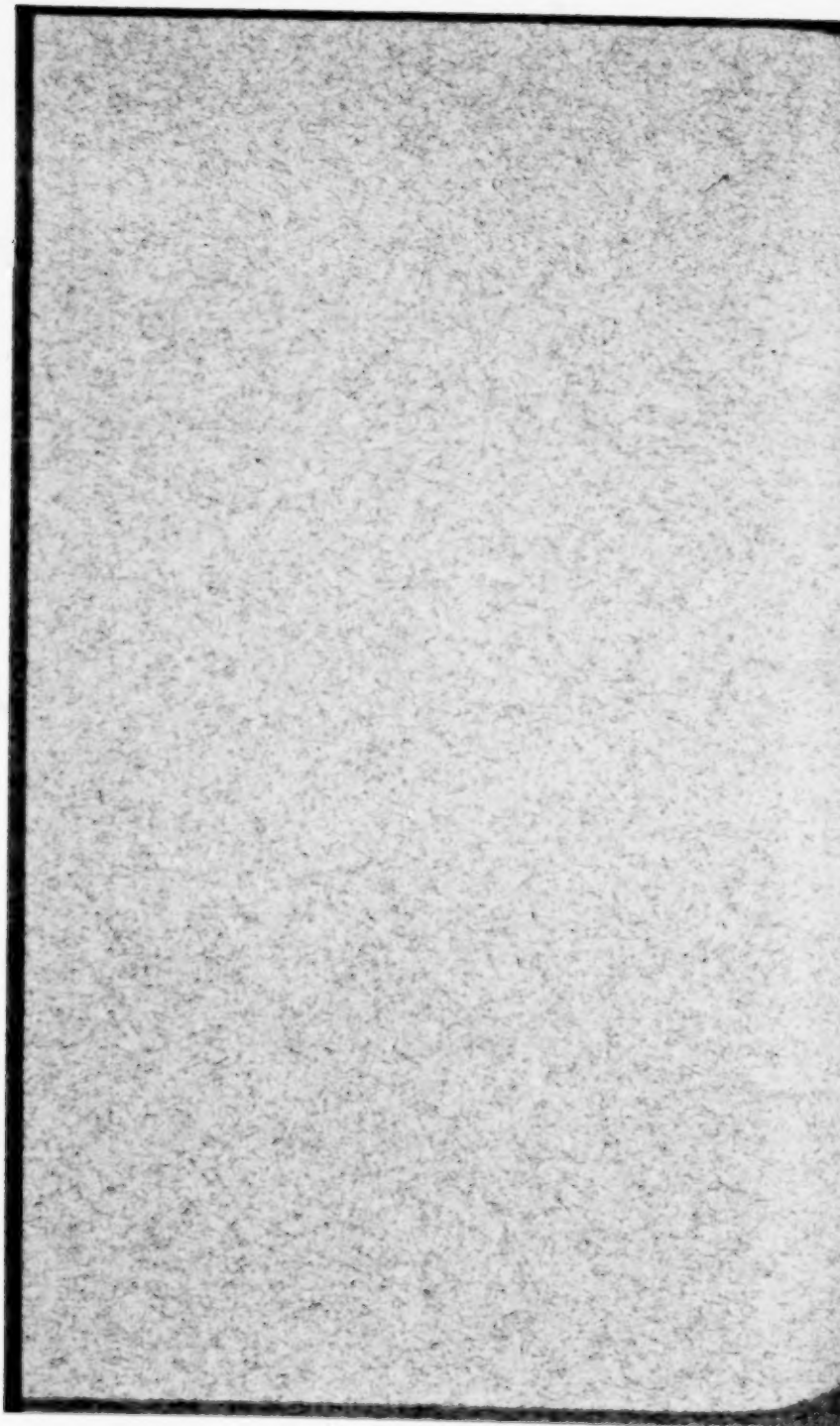

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1925

No. 390

ROBERT B. WHITESIDE, W. J. CONAN,
ELIZA CONAN, THE SHAWMUT COMPANY,
ROUCHLEAU-RAY IRON LAND COMPANY,

Appellants,

vs.

SAMUEL LORD, J. G. ARMSON AND ODIN HALDEN,
Constituting the Minnesota Tax Commission;
CLIFFORD L. HILTON,
Attorney General of Minnesota;
R. P. CHASE,
Auditor of Minnesota; and
HENRY RINES,
Treasurer of Minnesota,

Appellees.

Appeal from the District Court of the United States
for Minnesota

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

No offical report of the opinion of the lower court has been published, but the opinion is found in the Transcript of Record, on page 73.

The date of the decree of dismissal to be reviewed is January 15, 1925, and the same is found on page 90 of the record.

The suit was brought to enjoin the enforcement of Chapter 226 of the Laws of Minnesota for the year 1923 upon the ground that the same violates the Fourteenth Amendment to the Constitution of the United States. A decree was entered by the lower court dismissing the bill of complaint on the ground that the statute is constitutional.

In addition, it was conceded on the trial by counsel for the defendants that the lower court had equity jurisdiction (R. 71). The jurisdiction of this court is invoked under Section 238 of the Judicial Code as involving the construction or application of the Constitution of the United States, and being a case in which the Constitution or law of the State is asserted to be in contravention of the Constitution of the United States. The case of *Oliver Iron Mining Company* v. *Lord, et al*, 262 U. S. 172, is believed to sustain the jurisdiction of this court.

THE STATUTE

Chapter 226 of the Laws of 1923 is set out in the appendix. The more important parts of the statute to which frequent reference will be made are as follows:

Sections 1, 2 and 8 of the Act are as follows:

> Sec. 1. **Tax on Iron Ore Royalties—Rate.**— There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.
>
> Sec. 2. **Definitions.** For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, co-partnerships, associations, companies and corporations.

Sec. 8. **Tax a Lien On Lands and Ore.** The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

The other sections for the most part relate to the assessment and collection of the tax.

This tax is not in lieu of, but in addition to, the ad valorem tax imposed on all land in this state, including land leased for the purpose of mining ore (Alleged in paragraph 7 of plaintiff's complaint R. 23 and admitted in paragraph 11 of the answer R. 40. It was agreed that matters alleged in the complaints and admitted in the answers should be deemed proved R. 48).

THE CONSTITUTIONAL PROVISIONS WHICH THE ACT VIOLATES

(1) That part of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides that "no state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) That part of Section 1 of Article 9 of the Constitution of Minnesota which provides that "taxes shall be uniform upon the same class of subjects * * *."

THE CONTENTIONS OF THE PARTIES IN THE LOWER COURT

The Act does not give the tax a name nor designate its subject except as royalty, or royalty received, royalty being defined to mean the amount in money or value of property re-

ceived, etc. The Act does not in terms say whether the tax is intended to be upon persons or upon occupations or upon property; whether it is intended to be a tax upon personal or upon real property; upon money or upon income; upon an occupation; upon a privilege; or upon something else.

The plaintiffs contended that the tax is not uniform upon any class of subjects; that the enforcement of the law would deprive them of the equal protection of the laws; and would deprive them of their property without due process of law.

In the lower court counsel for the State, while declining to say what kind of a tax the Act was intended to impose, or what is the precise subject of the tax, said:

> "Stating the classification so as to include all interpretations of the nature of the tax, as they are expressed by the plaintiffs, the first question is, does a classification which includes only ore; or ore lands; or persons because of their ownership of ore or ore lands; or persons who have, by leasing their lands, effectively arranged for the extraction of their ore; or includes only royalties, or rents, or profits, or gains, from ore lands, violate any of these rules in respect to classification?"

They said further:

> "The question is wholly one of classification. Iron ore is a permissible class of property. Persons engaged in mining iron ore form a permissible class of persons. Certainly it follows that persons who own ore lands, or leasehold interests in ore lands, or who received royalty, rents or gains therefrom, are no more discriminated against, either as persons, or in respect to their receipts or in respect to their property, than either the property owners or the miners were in the Heisler and Oliver cases."

THE DECISION OF THE LOWER COURT

The lower court, in the last sentence preceding the paragraph numbered 1 of the memorandum filed with the order appealed from, said (R. 74):

"The question is whether this court should hold that the classification, royalties, adopted by the Legislature of the State of Minnesota, as a basis of taxation, or for the computation of the tax under Chapter 226, Laws of Minnesota, 1923, is invalid and that the tax levied pursuant thereto is void."

The court sustained the tax and said that it

"might have been laid as an occupation tax, or as an income tax, or as a tax on the land * * *." (Paragraph 11 of Memorandum, R. 80).

The court held that the tax, as actually laid, is a tax upon property, viz: upon an interest in land (Paragraph 11, Memorandum, R. 81).

"Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid, and it is so construed in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax."

The court sustained the tax upon the ground that

"Of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration." (Paragraph 6 of Memorandum, R. 78).

THE FACTS

The defendants comprise the Minnesota Tax Commission, the Attorney General, State Auditor, and State Treasurer. The individual plaintiffs are citizens and residents of the State of Minnesota. The other plaintiffs are Minnesota corporations. Each plaintiff owned certain iron ore properties during the year 1923 from which royalties were derived pursuant to the terms of mining leases thereon (R. 49). Said leases were made in

the years 1898, 1902, 1911, 1912 and 1919 respectively. Each lease was for the term of fifty years (R. 53, 54). Exhibit A, appearing on pages 56 to 66 of the printed record, is a fair sample of all the leases in this and other similar actions pending (R. 51).

The royalties under said leases are payable on the 20th day of each January, April, July and October, on account of the minimum requirements and on account of the ore mined during the three preceding calendar months (R. 54).

Under the statutes of the State of Minnesota, all real property is valued for ad valorem taxation purposes and the taxes are assessed as of such value on the first day of May of each year, and likewise all personal property and money and credits are valued and assessed for ad valorem taxes as of the first day of May in each year. Under such statutes, the said fee interests of the plaintiffs in the iron ore in said real estate is valued for taxation purposes at fifty per cent (50%) of its true and full value which is higher than the valuation for taxation purposes of any other class of property whatsoever in the State of Minnesota. The surface of said fee interest is valued for taxation purposes under said statutes at forty per cent (40%) of its true and full value where it is urban property and thirty-three and one-third per cent (33⅓%) where it is not urban property. Under said statutes moneys and credits of the plaintiffs are taxed as are the moneys and credits of all residents and corporations throughout the state at three (3) mills on the dollar of the actual valuation thereof (Alleged in Paragraph 7 of Bill of Complaint, R. 23; admitted in Paragraph VII of Answer, R. 40; and agreed to be deemed proved Paragraph 1 of Agreed Statement of Facts, R. 48; also Paragraph 12, Agreed Statement of Facts, R. 54).

On May 1, 1923, the plaintiff, Robert B. Whiteside, had on hand more than $6,000.00, and The Shawmut Company more than $13,000.00 of royalties received during 1923, all of which

the respective plaintiffs reported for assessment and taxation under the money and credits law of the State of Minnesota and on which they were assessed under said law and were required to pay taxes. That law requires the payment of a tax of three mills on the dollar on all moneys and credits owned by residents of the State of Minnesota on May 1st of any year (Paragraph 12, Agreed Statement of Facts, R. 54).

There were, during the year 1923, at least four instances in which fee owners other than the plaintiffs operated their own properties and sold the ore produced without receiving or paying royalty thereon (R. 55). In the majority of cases where mines are operated, they are operated by lessees who derive the returns or consideration from the ore produced through mining and selling it, and do not receive any returns through royalty paid to them. This was true in 1923 (R. 55).

The iron ore in the lands of the plaintiffs constitutes the chief value thereof, and in the case of iron ore deposits generally, the entire substantial value thereof consists in the iron ore (R. 55).

During the year 1923 the total amount of royalty on iron ore reported to the Minnesota Tax Commission was $16,347,004.22, of which amount approximately $9,538,151.87 was reported as being received by resident owners, excluding from such resident owners foreign corporations; and approximately $1,474,150.58 was reported as being received by corporations foreign to the State of Minnesota; the remainder, approximately $5,334,701.77, being reported as received by non-residents of the State (R. 55).

All the known iron mines of the State of Minnesota are in the northern and northeastern part of the State (R. 55).

Approximately one-half of the mines operated in 1923 were open pit mines, and approximately three-fourths of the ore mined in 1923 was taken from open pit mines. In the usual course of mining from open pit mines, the surface is re-

moved and the ore mined by the use of steam shovels (R. 55).

At various times, two hundred forty-three iron mines have been in operation in the State of Minnesota, of which forty-five have been exhausted (R. 55).

The total tonnage of merchantable ore in Minnesota, according to the figures of the Minnesota Tax Commission in 1923, was approximately 1,300,000,000 tons. During the year 1923 approximately forty mines owned in fee by subsidiary corporations of a certain corporation were held by those corporations free from lease and were not operated. Said mines, according to said Tax Commission's figures, contained 344,000,000 tons of ore. Several of said mines were, prior to the year 1923, operated by an operating company of said parent corporation under arrangements between said operating company and other subsidiary corporations, which arrangements did not, in any instance, involve the payment of any royalty by said operating company to any such owning subsidiary corporation. During 1923 one mine was operated under such arrangements, and it is the present intention of said corporations to continue said practice of operating their said mines under the aforesaid arrangements, not involving the payment of royalty (R. 55, 56).

The total tonnage of merchantable ore in land owned by the State in December, 1922, was approximately 150,000,000 tons. A total of eighty-four state mining leases were then outstanding. In 1923 the State was paid royalties of approximately $1,955,805.40 on ore owned by it, most of the leases being on a twenty-five cent royalty basis. The royalty paid in 1923 represents a tonnage mined on State owned lands of about 5,000,000 tons. About one-tenth of the merchantable ore of the State belongs to the State of Minnesota (R. 70).

Royalty rates in iron mining leases in Minnesota vary from twelve and one-half cents to One Dollar and twenty-five cents per ton (R. 70).

It has been the practice in Minnesota for many years to lease real estate such as business lots in cities on long time leases for rentals payable and paid in cash, and this was true during 1923 (R. 70). Agricultural lands were likewise leased for rentals paid in cash or otherwise (R. 70).

Upwards of four million yards or tons of gravel are used in Minnesota in each year, gravel being found in about half of the localities of the State. The greater part of the gravel pits are leased on a royalty basis, the royalty being from five to twenty-five cents per yard, and usually ten cents per yard. The leases of large gravel pits commonly carry a minimum payment per year. The method of mining is similar to that of mining ore by open pit operations, and this was true in 1923. There are about forty large commercial pits in the State (R. 67). The State itself uses from five hundred thousand to one million tons or yards of gravel per year, about three-fourths of which is leased upon a royalty basis. It holds from fifteen hundred to eighteen hundred leases on a royalty basis. The State is also the lessor in a considerable number of gravel leases (R. 68).

In recent years there were several instances in which iron ore properties not subject to lease were sold, and the fee transferred for a cash consideration. In 1923 there were at least two, and possibly more, instances in which fee owners of iron ore land, which was not subject to lease, sold the same for a cash consideration or its equivalent. In one case, an undivided one-sixteenth interest in fee was purchased by a company which already held a lease on the remaining fifteen-sixteenths interest (R. 56).

SPECIFICATION OF ERRORS URGED

The court erred as to each appellant:

1. In dismissing appellants' bill of complaint and entering a decree for the defendants.

2. In holding that Chapter 226 of the Laws of Minnesota, 1923, does not violate Section 1 of Article 9 of the Constitution of the State of Minnesota, which requires that taxes shall be uniform upon the same class of subjects.

3. In holding that the tax imposed by said Act is not obnoxious to the Fourteenth Amendment to the Constitution of the United States securing to all persons within the State the equal protection of the laws.

4. In holding that the tax does not violate the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

5. In holding that the tax is upon land or certain interests therein, and holding that leased ore land may be segregated in a special class and an additional tax levied thereon, when no similar tax is imposed on unleased ore land.

6. In holding that the fact that iron lands are being depleted of their natural wealth furnishes a proper basis for classification under which they may be subjected to special and double taxation.

7. In holding that for the purpose of special taxation it is proper to classify lands according to the form of contract by which they are disposed of or enjoyed.

8. In failing to hold that plaintiffs are entitled to the relief prayed for in their bill of complaint, and in failing to render a decree permanently enjoining the defendants from enforcing the provisions of said Act.

SUMMARY OF ARGUMENT

(The argument is prefaced by a reference to the character of the statute and a brief preliminary discussion of the decisions.)

I

CONSIDERED AS A TAX ON AN INTEREST IN LAND

1. It was not the purpose of the Legislature to impose a new and additional tax upon an interest in land.

2. If, however, the Act is to be considered as one attempting to impose a tax upon an interest in land, it is invalid, because the tax is not imposed upon an interest in all land, nor is it imposed upon an interest in all of any class of land.

(1) The lower court held that the underlying reason for the classification upon which the constitutionality of the Act may be sustained is the circumstance that the ore lands to which it applies are being depleted. It is a fact, however, that other ore lands to which the Act does not apply are being depleted in the same manner. The tax, therefore, is not uniform upon all ore lands that are being depleted.

(2) It is a tax only upon an interest in such lands as are subject to lease permitting the lessee to explore for, or mine ore, and it is imposed upon leased lands yielding royalty, without regard to whether the lands in fact contain ore, and without regard to whether ore is being extracted.

(3) All lands which are leased for the purpose of exploring for, or extracting ore, are subject to this tax and are also subject to the usual ad valorem tax, so that lands leased in this manner are subject to two taxes, while unleased lands are subject to but one tax, unless the tax imposed by Chapter 223 of the Laws of Minnesota, 1921, which this court has held to be an occupation tax, is now to be considered in substance a property tax.

II

CONSIDERED AS A TAX ON MONEY

1. It was the purpose of the Legislature in passing Chapter 226 of the Laws of 1923 to impose a tax upon money.

2. Considered as a tax upon money it is invalid because:

(1) For the purpose of taxation all money is alike. It is incapable of classification.

(2) More specifically, the attempted classification is based upon the source or origin of the money, and no such classification is valid.

(3) The money received as royalty is taxed in a different and more burdensome manner than any other money. All money received as royalty is taxed at least once and part of it is taxed twice. No other money is taxed twice and only that part of all other money which is on hand May 1 in each year is taxed at all.

III

CONSIDERED AS A TAX ON INCOME

1. The law is not an income tax law because:

(1) It does not conform to the common characteristics of all income tax laws.

(2) The tax is more of a tax on capital than on income.

2. If it is intended to be an income tax law, it is invalid because the tax is not uniform upon the entire class, income.

IV

CONSIDERED AS AN OCCUPATION TAX

It is not an occupation tax because the Act contains no language indicating any purpose on the part of the Legislature to impose an occupation tax and the tax has none of the usual incidents of an occupation tax.

V

CONSIDERED AS SOME OTHER FORM OF AN EXCISE TAX

1. The Act contains no language indicating any purpose on the part of the Legislature to impose a privilege tax.

2. Construed as an Act imposing a tax upon the privilege of leasing lands, it is retroactive and the plain terms of the statute forbid the construction that it was intended to impose a tax upon the past transaction of making a lease.

3. A privilege tax is usually imposed upon a privilege which the taxpayer is free to exercise or not. In the case of leases made before the passage of the Act the taxpayer has no such freedom if the tax is upon the privilege of leasing.

4. Even if the tax were in form a privilege tax, it would nevertheless be in substance a tax upon property.

VI

THE HEISLER CASE

The Heisler case has no bearing upon the present case.

VII

CONCLUSION

It was not the purpose of the law to impose any form of excise tax. It was the purpose of the Legislature to impose a property tax. The Act cannot be sustained as one imposing a tax upon property for the reason that it violates the equal protection and uniformity clauses of the Federal and State Constitutions, whether the tax be considered as one upon real estate, upon money, upon income, or upon any other form of property. It does not apply equally to any possible class or any kind of property.

ARGUMENT

(Unless otherwise stated all italics are ours.)

CHARACTER OF STATUTE AND THE DECISIONS

The tax sought to be imposed by Chapter 226 of the Laws of 1923 is unique. So far as we can learn no Legislature ever before attempted to impose a similar tax. The Legislature gave the tax no name, but defined its subject as the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore and mine ore therefrom. This seems to be a tax upon money. The lower court, however, held that the tax is upon an interest in land.

We shall discuss it as a tax on land which the lower court held it to be; as a tax on money, which the Legislature seems to say it is; and also as a tax upon income; as a tax upon an occupation; and as a tax upon a privilege. There is nothing else upon which the tax could be laid.

Whether the law is valid depends upon the validity of the classification adopted by the Legislature. The same rules of classification apply whether the tax be considered as a tax upon land, upon money, upon income or upon an occupation or a privilege.

Although the principles upon which classifications for governmental purposes may be made, have been frequently and fully stated, we desire to cite a very few cases illustrating those relevant to the question under consideration.

Sams v. *St. Louis & M. R. Co.*, 174 Mo. 53, 73.

> "An act of class legislation to stand in the face of the Constitution must include all who belong to the class—not all who bear similarity in some characteristics to those included—but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class."

Johnson v. *St. Paul & Duluth Railroad Company*, 43 Minn. 222, 224.

"It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' *But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions.*"

Truax v. *Corrigan*, 257 U. S. 312, 333.

"Thus the guaranty was intended to secure equality of protection, not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of the equal protection of the laws of the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Southern R. R. Co. v. *Green*, 216 U. S. 400, 417.

"While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; * * *."

State ex rel v. *Wagener*, 69 Minn. 206, 208.

"This court has often held that, under these sections, *the legislature must treat alike all who are in the same condition, must make the law apply to a whole class, and cannot make a law which applies only to a part of a class.* And the class must be selected on some distinction, or be defined by some principle, which might naturally or properly distinguish it from all other classes."

Murray v. *Board of County Commissioners,* 81 Minn. at 361.

> A classification "*must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect thereto. Any law based upon such classification must embrace all and exclude none, whose condition and wants render such legislation necessary or appropriate to them as a class.*"

Mutual Benefit Insurance Co., v. *County of Martin,* 104 Minn. 179, 183.

The court held that real estate mortgages may be placed in a class by themselves for purposes of taxation. This is partly because it is impracticable to apply to them the ordinary methods of taxation, and partly because the law, in giving the lender of money the right to security and to the safety afforded by the records, gives a benefit which cannot be obtained without the aid of such laws, and the State has the right to tax such a benefit.

The court said:

> "Under this provision (Section 1 of Article 9 of the Constitution of Minnesota) all property belonging to the same class must be treated alike. There must be no discrimination between the subjects of that class. The same means and methods must be applied impartially to all the constituent elements of the class."

State v. *Julow,* 129 Mo., at 177.
The court said:

> "*The legislature* may legislate with regard to a class of persons, but they *cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes* and enact different rules for the government of each."

Counsel for the State, and the lower court, quote general statements from certain opinions of this court. We wish briefly to refer to the cases in which the statements quoted were made.

The case of *Keeney as Administrator* v. *State Comptroller,* 222 U. S. 525, involved the validity of a transfer tax. There was in fact a clear distinction between the transfer taxed and other transfers which were not taxed. Justice Lamar made the remark, at page 536, "*But when there is a difference* it need not be great or conspicuous in order to warrant classification."

In *Citizens Telephone Company* v. *Fuller,* 229 U. S. 322, 331, this court said that the classification adopted by the statute had a reasonable basis resting on a real distinction. It also said, in substance, that while the classification adopted was not exact, "the appellant is not affected by the inexactitude." (Page 332). The appellant was, therefore, not in position to complain. In the course of the opinion, this court made the statement quoted by the lower court.

The statute involved in the case of *Watson* v. *State Comptroller,* 254 U. S. 122, imposed an inheritance tax at a higher rate upon the transfer of personal property which had escaped proper taxation during the life of the deceased than was imposed upon the transfer of property upon which a proper tax had been paid. The court upheld the classification and said, in substance, that no classification could be more reasonable than the one upon which the statute was based, and further said that it is enough if the classification is reasonably founded in "the purpose and policy of taxation."

In the *District of Columbia* v. *Brooke,* 214 U. S. 138, 149, this court said:

> "In the case at bar we are dealing with an exercise of police power, one of the most essential powers, at times the most insistent, and always one of the least limitable of the powers of Government."

The statute there under consideration enjoined a duty alike upon residents and non-residents. The difference between the treatment of residents and non-residents was only in the manner of enforcing the right so enjoined. That different remedies may, and often must, be used as against residents and non-residents, is obvious and according to long established practice.

In the case of *Middleton* v. *Texas Power and Light Company*, 249 U. S. 152, this court was again dealing with an exercise of the police power and, among other things, said, at page 157:

> "There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds."

but added, on page 158:

> "But in this case adequate grounds are easily discerned."

We wish also to refer to one or two other statements which are to be considered with those quoted by the lower court.

In *Boyd* v. *United States*, 116 U. S. 616, 635, Justice Bradley said:

> "It is the duty of the Courts to be watchful for the constitutional rights of the citizens against any stealthy encroachments thereon * * *."

Justice Brewer, in the case of *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S. at 154, quoted the foregoing language and said further:

> *"While good faith and a knowledge of existing conditions on the part of the Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."*

and also said:

> "No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation for free government."

All constitutional guaranties in regard to taxation are intended to secure equality and to prevent the Legislature imposing unequal burdens of taxation. Few legislators feel that they have any responsibility as to the constitutionality of a law, or that they are competent to pass upon the question. This is especially true when the voters in the larger part of a State wish to shift the burden of taxation to a small part of the State. Unless the courts see to it that the guaranties of equality and uniformity are enforced, the legislators, in deference to local public opinion, will fritter the guaranties away.

This court recently said, in the case of *Truax* v. *Corrigan*, 257 U. S. 312, 332:

> *"The framers and adopters of this (Fourteenth) Amendment were not content to depend on a mere minimum (of protection) secured by the due process clause, or upon the spirit of equality which might not be insisted upon by local public opinion. They, therefore, embodied that spirit in a specific guaranty."*

Different methods of taxation are, for various reasons, adaptable to different classes of property. It is widely recognized that methods which are practicable in the case of lands and tangible personal property are not practicable in the case of money and intangible property. Different states meet the difficulty in different ways. Minnesota imposes a uniform three mill tax on money, credits, stocks and bonds, while the rate upon tangible property is much higher and varies in the different taxing districts. Massachusetts and New Hampshire, in the exercise of powers permitted by recent amendments to their respective constitutions, impose a tax upon the income from in-

tangible property and exempt the property itself from ad valorem taxes. In Minnesota, in New York, and in a few other states, there are laws under which a mortgagee, at his option, may pay a registration tax upon his mortgage in lieu of all other taxes upon it. In Minnesota and elsewhere railroad companies are subject to a gross earnings tax in lieu of all other taxes upon the property devoted to the transportation business. This tax is held to be a tax upon the property and the gross earnings to furnish a convenient measure of its value. The same method of taxation is applied to telephone, telegraph and express companies. The Supreme Court of Minnesota has said that this method of taxation was resorted to because, as to the property involved. it is not practicable to make an ordinary valuation. *State* v. *Wells-Fargo Company,* 146 Minnesota, at 456. Minnesota, New York, Connecticut, and other states have provided special means of reaching property which has evaded or otherwise escaped the payment of taxes imposed in the usual manner.

With this brief reference to a few of the many cases involving questions of classification and these general observations as to the different methods of taxing different kinds of property, we shall endeavor to discuss the question whether there is any permissible classification upon which this statute can properly be based.

I

CONSIDERED AS A TAX ON AN INTEREST IN LAND

1. It was not the purpose of the Legislature to impose a new and additional tax upon an interest in land.

2. If, however, the Act is to be considered as one attempting to impose a tax upon an interest in land, it is invalid for the reasons stated in "2" below.

1. If the Legislature had intended to impose an additional tax upon land, it would have been easy to make the purpose plain.

The Legislature, by Section 1977 of the General Statutes of Minnesota, 1923, which has been in force for many years, carefully defined real property for the purpose of taxation as follows:

> "Real property, for the purpose of taxation shall be construed to include the land itself, and all buildings, structures, and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, quarries, fossils, and trees on or under the same."

There is nothing in the 1923 Act to indicate a purpose on the part of the Legislature to disregard or to change this definition.

Mining leases are leases in fact as well as in name, and the royalty payable under them is rent.

State v. *Evans,* 99 Minn. 220;

Boeing v. *Owsley,* 122 Minn. 190;

State v. *Royal Mineral Association,* 132 Minn. 232;

Von Baumbach v. *Sargent Land Co.,* 242 U. S. 503.

Unaccrued rent is real estate. Rent past due is personal property.

State v. *Royal Mineral Association,* supra;

Burden v. *Thayer,* 3 Metcalf 76;

Kennedy v. *Kennedy,* 66 Ill. 190;

Tiffany on Landlord and Tenant, page 1103.

And, more specifically, royalty past due is "an item of money due and payable."

State v. *Royal Mineral Association,* 132 Minn., at page 237.

But it is not unaccrued royalty, nor even royalty due and payable, which is sought to be taxed by this Act. It is royalty

received and that, by the commonly understood meaning of the words, and by the definition of the Act itself, is money received and, therefore, personal property and not an interest in land.

Section 8 of the Act of 1923 declares that the situs of royalty for all purposes of the Act shall be in the State of Minnesota. If the tax is intended to be upon real estate, there can be no occasion for this declaration. The declaration is further evidence that it was the intention of the Legislature to impose the tax upon money, and not upon land.

This will be referred to again in Division II of this brief.

2. The Act, considered as one attempting to impose a tax upon an interest in land, is invalid because the tax is not imposed upon an interest in all land, nor is it imposed upon an interest in all of any class of land. It is a tax upon leased ore lands but not a tax upon unleased ore lands.

(1) The lower court held that the underlying reason for the classification upon which the constitutionality of the Act may be sustained is the circumstance that the ore lands to which it applies are being depleted. It is a fact, however, that other ore lands to which the Act does not apply are being depleted in the same manner. The tax, therefore, is not uniform upon all ore lands that are being depleted.

(2) It is a tax only upon an interest in such lands as are subject to lease permitting the lessee to explore for, or mine ore, and the tax is imposed without regard to whether the lands in fact contain ore, and without regard to whether ore is being extracted.

(3) All lands which are leased for the purpose of exploring for, or extracting ore, are subject to this tax and are also subject to the usual ad valorem tax, so that lands leased in this manner are subject to two taxes, while unleased lands are subject to but one tax, unless the tax imposed by Chapter 223

of the Laws of Minnesota, 1921, which this court has held to be an occupation tax, is now to be considered in substance a property tax.

(1) It is not a tax upon an interest in all land in which the ore is being depleted.

The lower court said that the basis and the underlying consideration for the classification upon which the Act may be supported is:

> "the circumstance or condition that, of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. *This is the underlying consideration.*" (Paragraph 6 of the Memorandum, R. 78).

In 1923 there were about 1,300,000,000 tons of merchantable iron ore in the State of Minnesota (R. 55). Of this the subsidiaries of one company owned in fee, not subject to lease, more than 344,000,000 tons. It is the intention of the owners of all that ore to mine it without the payment of royalty (R. 56). Neither that ore nor the land will be subject to the tax imposed by this act. During the year 1923 there were at least four instances in which fee owners operated their properties and sold the ore produced without receiving or paying royalty thereon (R. 55). These properties were being depleted (and the State being deprived of a source of revenue) as much as leased lands were being depleted. In none of those four cases were the ores or the lands subject to this tax. The underlying consideration for the classification upon which the lower court said the Act is based, applies to those four cases, and to the 344,000,000 tons of unleased ore, as well as to the leased ore of the plaintiffs.

If the 1923 Act is the only one to be considered, the lack of uniformity is obvious. It does not operate uniformly upon any class of property based upon the underlying consideration upon which the lower court said the classification may be up-

held, the underlying consideration being the depletion of the ore. The ore from unleased land is being, and will be, depleted, but is entirely free from this Act because it taxes only leased ore land.

The lower court clearly recognized that unleased ore land is being depleted and not taxed by the Act under consideration, but held that it is taxed under Chapter 223, of the laws of 1921, commonly known as the occupation tax law. The court said that

> "as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator, who does the mining and the owner whose ore is being mined and the respective interests of each * * *. Although together, the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. So great is that difference that one class, or one set of interests, may be taxed without the other as was done by the Act of 1921 * * *." (Paragraph 9 of the Memorandum, R. 79, 80).

The Act of 1921 to which the lower court referred is Chapter 223 of the laws of that year. It imposed a tax only upon the occupation of mining.

The constitutionality of that Act (except as to one application thereof) was upheld by this court in the case of *Oliver Iron Mining Company* v. *Lord*, et al, 262 U. S. 172. The lower court said that the 1923 Legislature found that *the* 1921 *Act*

> *"on its face, pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of 6%. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The Legislature found this latter class already carved out by the earlier Act.* * * *. One of these classes, represented by the operator, was specified in Chapter 223 supra and a tax burden by that Act was imposed thereon. The other interest, represented by those

receiving royalty, was specified in Chapter 226 Laws of 1923 and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter. In the consideration of this case, it is neither possible nor proper to divorce entirely the two Acts which have been referred to." (Paragraph 4 of the Memorandum, R. 77).

The lower court said that the lessor's interest in leased ore land is a "class already carved out." And the lower court said, in paragraph 5 of the Memorandum (R. 78), that "The Federal Constitution does not require that the two classes above referred to should be covered by the same enactment"; and again said, in paragraph 9, that one of these interests or classes is dealt with in the Act of 1921, and that

> "*Although the tax under the Act of* 1921 *is an occupation tax the same is levied because of the operator's relation to the land, and in the last analysis, because of his interest therein.* By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases *where there is but one ownership, the tax is imposed under the Act of* 1921." (End of Paragraph 9 of Memorandum, R. 80).

That the Federal Constitution does not require the entire field of legislation, nor any two classes of property, to be covered by one act is clear enough. But it seems equally clear that all of any one class must be covered by the same or by simultaneously enacted laws. Otherwise the law, or laws, cannot operate uniformly upon all members of the class and the constitutionality of one statute is dependent upon the enactment, or the repeal, of some other statute. In the remainder of the discussion in this division of the brief, we shall assume that the class, ore lands which are being depleted, might be dealt with in two acts, although we believe the assumption is not correct.

The lower court said that the class of property to be reached consists of the ore lands which are being depleted and which will soon be lost to the State as a source of revenue; that

there are usually two classes of persons or two sets of interests involved in the mining operation; that one of these was taxed by the 1921 Act and the other by the 1923 Act. "Although the tax under the Act of 1921 is an occupation tax, the same is levied because of the operator's relation to the land, and in the last analysis, because of his interest therein. By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed." (Paragraph 9 of Memorandum, R. 80). In paragraph 11 of the Memorandum (R. 81) the court said that the tax under the 1923 Act is "essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case." In substance that is to say that both acts impose taxes upon the land.

The court says the class to be reached consists of the ore lands which are being depleted. There are, however, at least 344,000,000 tons of ore in land which is not subject to lease (R. 55, 56, 70), and so is not subject to the tax imposed by the 1923 Act. That is, at least one-fourth of all the ore in this state is not subject to the tax. Nearly two-fifths of the privately owned ore in the State are not subject to the tax imposed by that Act. This unleased and untaxed ore was being depleted in 1923 and will be depleted just as the leased ore is being and will be depleted (R. 55, 56). Unless some other law taxes the unleased ore, then the class to be reached—the ore lands which are being depleted—is not taxed uniformly. Leased ore which is being depleted is taxed; unleased ore which is being depleted is not taxed. The lower court, however, said that the unleased ore is taxed by the 1921 Act. "In cases where there is but one ownership, the tax is imposed under the Act of 1921." (Last sentence of Paragraph 9 of Memorandum, R. 80).

In order to sustain the decision of the lower court that the tax is valid as a tax upon land, it is necessary to say that the 1921 Act and the 1923 Act may be considered together and that the former, as well as the latter, imposes a tax upon land.

It therefore becomes important to determine whether the tax imposed by the Act of 1921 is a tax upon an interest in land.

Clearly the Legislature did not intend by that Act to impose a tax upon an interest in land. That is just what it wished to avoid. The Act is entitled, "*An act providing for the imposition of a tax upon persons, * * * engaged in the business of mining or producing iron ore* and other ores * * *." The first section provides that "*every person engaged in the business of mining or producing iron ore,* or other ores, in this state, *shall pay* to the State of Minnesota *an occupation tax* * * *."

The appellants in the case of the *Oliver Iron Mining Company* v. *Lord*, et al, 262 U. S. 172, insisted that the 1921 Act imposes a property tax and should be held void because it does not operate uniformly upon any entire class of property. In many forms they insisted that

> "* * * it is, in its essential nature, a property tax." "The tax, by whatever name called, is essentially a tax upon property." "The purpose was to tax the property value in the iron ore, and that is exactly what the Legislature has done in this Act." "We have thus demonstrated * * * that the tax in question is essentially a tax upon property."

Counsel for the State in that case contended that the tax is not a tax upon either the land or the ore which is produced, but a true excise tax upon the business of mining.

This court held that the tax is not a property tax, but an occupation tax, and said:

> "The parties differ about the nature of the tax, the plaintiffs insisting it is a property tax and the defendants that it is an occupation tax * * *. We think the tax in its essence is what the Act calls it,—an occupation tax. *It is not laid on the land containing the ore, nor on the ore after removal,* but on the business of mining the ore * * *. Mining is a well recognized business wherein

> capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing * * *."

The basis upon which this court said the tax imposed by the 1921 Act is an occupation tax is that *the tax was laid on those who are engaged in the mining business "solely because they are so engaged."* The lower court, in the present case, however, said that the occupation tax imposed by the 1921 Act is levied, not for the reason stated by this court, but *"because of the operator's relation to the land, and in the last analysis, because of his interest therein,"* and said, in substance, that the unleased ore lands are taxed by the 1921 Act.

The decision of the lower court in this case cannot be sustained unless its view of the 1921 Act is correct. We submit that its view is directly in conflict with the view of this court and with the recent decision of the Supreme Court of Minnesota, in which that Court also held that the 1921 Act imposes an occupation tax. *State* v. *Crete Mining Company*, 204 N. W. 932 (Decided July 17, 1925. Not yet officially reported).

Sometimes legislatures try to circumvent the constitutional guaranties of uniformity and equality as they apply to property taxes by calling a property tax an occupation tax, as in the case of *Dawson* v. *Kentucky Distilleries Company*, 255 U. S. 288, *Thompson* v. *Kreutzer*, 112 Miss. 165; and *Thompson* v. *McLeod*, 112 Miss. 383, 388, elsewhere cited in this brief. The legislatures take such pains because an occupation tax is not a tax upon property, except in the remote sense that all taxes may be said to be taxes upon property because they must be paid with the proceeds of property.

That the tax imposed by the 1921 Act is not a tax upon property was directly held in the case of *Oliver Iron Mining Company* v. *Lord*, et al, supra. It is well settled that neither

an occupation tax, nor any other form of excise tax, is a property tax.

State ex rel v. *Carrel*, 90 Ohio State, 220, 226.

"An occupational tax is in no sense a tax upon property, but is well understood to be a tax on the right to carry on trade, or to transact business."

Ohio Tax Cases, 232 U. S. 576, 593.

"Fifthly, it is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the State Constitution. But, as was pointed out by the District Court, the exaction of 4% of the gross intra state earnings is not a property tax, but an excise tax whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay a tax with respect to property, another with respect to the privilege or occupation; hence the tax is not double."

This court said, in *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 145:

*"It is, therefore, apparent * * * that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof * * *."*

And further, on page 150:

"The act now under consideration does not impose direct taxation upon the property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Article I, Sec. 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts, and excises * * *."

To the same effect are: *Savings Society* v. *Coite*, 6 Wall. 594; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Provident Institution* v. *Massachusetts*, 6 Wall. 611.

Eliasberg Brothers Mercantile Company v. *Grimes,* 204 Alabama 492, 495:

> "Practically all courts and textbook writers are agreed that an excise tax, being a tax on business or occupations, however measured, is not a tax on property."

Cooley on Taxation, 4th Edition.

> Section 42: "If a tax is not a property tax or a capitation tax, it is properly classified as an excise tax * * *." Section 45: "An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes, and business taxes." Section 46: "Generally the term 'excise taxes' is used to distinguish such taxes from taxes on property. It is often very important to determine whether a tax is a property tax or an excise tax, i. e., whether (1) a property tax, or (2) an occupation, license, business, privilege, or franchise tax. Not only are excise taxes governed by many rules entirely different from those which control property taxes, but also there are many constitutional provisions applicable to taxes on property, but not to excise taxes. For instance an excise tax is not within constitutional prohibitions such as to requiring taxation of property by value, uniformity and equality of taxation. Such a tax is not objectionable as double taxation, although the property itself is also taxed. * * *."

It has often been held that a tax may be imposed upon the occupation of a merchant and another tax imposed at the same time upon the goods in which he deals, and that this does not constitute unequal taxation. This is because the tax on the occupation is not a tax upon the property dealt in. It was also in this manner that it was held that the corporation excise tax of 1909 was a tax upon the privilege of doing business as a corporation, measured by its income, but was not a tax upon its income.

In view of the clear distinction which exists between an occupation tax and a property tax, *this court having held that*

the tax imposed by the 1921 *Act "is not laid on the land containing the ore, nor on the ore after removal" should not now be asked to hold that it is, nevertheless, in substance a property tax.* That, however, is the basis upon which the lower court placed its decision.

The lower court, not only held that the occupation tax of 1921 is, in substance, a property tax, but assumed that it is valid when applied to one mining ore from his own property. This court, in the case of *Oliver Iron Mining Company* v. *Lord, et al*, expressly refrained from passing upon that feature of the law. This court said (pages 180 and 181) that the question is an important one, and is left entirely open.

If the 1921 Act is invalid as to owners mining ore from their own lands, then ore lands mined by the owners are not taxed even if the occupation tax imposed by the 1921 Act is now called a tax on property.

The lower court's view and the error of that view may be briefly stated as follows:

1. The ore lands which are being mined and depleted and lost to the State as a source of revenue form a proper class.

2. (a) There are usually two subclasses of such lands, those which are leased and those which are not leased. (b) In the case of leased lands there are two interests, that of the lessor and that of the lessee.

3. The 1921 Act was laid as an occupation tax.

4. In substance, however, the 1921 Act, which was laid as an occupation tax, is a tax upon property, viz: upon the lessee's interest in leased land and upon the entire interest in unleased land.

5. The 1921 Act left the lessor's interest in leased land untaxed. The 1923 Act imposed a property tax upon that interest.

6. By means of the two acts, the entire class—ore lands which are being depleted—is taxed.

The lower court thought it immaterial that this result can be reached only by saying that what is in fact an occupation tax is nevertheless in substance a property tax. We have found no case which holds that one part of a class of property can be taxed by a true property tax, and the other part by an occupation tax. On the contrary, the authorities are clear that an occupation tax is not a tax upon property.

The result is that one part of the class to be reached is taxed, while another part and a very large part, is not taxed.

The inequality of the tax is further illustrated by an instance mentioned in Paragraph 22 of the Agreed Statement of Facts (R. 56). No doubt, there are many such cases.

The owner of the undivided one-sixteenth of a parcel of ore land sold it to a company which had a lease upon the other undivided fifteen-sixteenths of the same parcel of land. The vendor paid no tax, other than the money and credits tax, upon the money he received. The purchaser pays no tax on said one-sixteenth, other than the ad valorem tax payable upon all lands. The owner of the fifteen-sixteenths under lease, however, must pay the royalty tax of six per cent imposed by the 1923 Act upon all the royalty he ever receives from the property. He must pay the tax only because his interest in the land is subject to lease. All of the ore in the land belongs to the same class of property, whatever the basis of the classification may be, unless the basis is only the difference between leased land and land not leased.

The one-sixteenth not under lease will necessarily be depleted just as rapidly as the fifteen-sixteenths which are under lease. But it will not be taxed.

(3) It is a tax only upon an interest in such lands as are subject to lease permitting the lessee to explore for and

mine ore, and the tax is imposed without regard to whether the land in fact contains ore, and without regard to whether ore is being removed.

The tax is imposed upon all land on account of the leasing of which royalties are paid, although no ore is being extracted, and even if the land contains no ore. The lease set out in the record contains a provision (R. 60, 61) requiring the lessee to pay the lessor a minimum amount of royalty yearly, without regard to whether ore is mined and without regard to the quantity or quality of iron ore in the land. That lease is a fair sample of all the leases involved (R. 51). If there is no ore in the land, or if none is being mined, the land is not being depleted, and the underlying consideration for the classification, upon which the lower court said the Act is based, fails.

(4) All lands which are leased for the purpose of exploring for, or mining ore are subject to this tax, and are also subject to the usual ad valorem tax levied upon all real estate within the State of Minnesota, so that lands leased in this manner are subject to two taxes, while no unleased land is subject to more than one tax.

If some lands in a class are subject to two taxes, while other lands in the same class are subject to but one tax, the tax is lacking in uniformity, and the owners of the land which is taxed twice are deprived of the equal protection of the laws. *Dawson* v. *Kentucky Distilleries Company*, 255 U. S. 288, 291 (note); *Campbell County* v. *City of Newport*, 174 Ky. 712, 723.

To the same effect is the case of *State* v. *Farmers and Mechanics Bank*, 114 Minn. 95, 113. Section 839 of the Revised Laws of Minnesota for 1905 (Section 2022 General Statutes, 1923) provides that the total deposits and accounts payable of certain banks shall be deducted from the total assets, including personal property appertaining to the business. The surplus, if any, is taxed as a credit. The appellant's office furniture,

having been taken into consideration in determining the surplus, was also separately assessed for taxation, so that the personal property of the appellant was taxed twice, while the personal property of others was taxed but once.

The court held that this was not permissible and said:

> "Since this property had already been taken into consideration in determining the surplus, it could not be separately taxed. Such a course would result in double taxation, which is forbidden by the Constitution, and is not authorized by the statute. * * * Although special reference may not have been made in the opinion to Sec. 1, Article 9, of the State Constitution, the argument and decision were intended to include a consideration of the requirement that taxes must be uniform upon the same class of subjects."

The only prohibition of double taxation is that which is necessarily implied in the constitutional provision that taxes must be uniform upon the same class of subjects.

Assuming that ore lands may properly be taxed in a different manner from other lands due to the fact that the extraction of the ore will soon deprive the State of a source of revenue, there can be no reason for taxing leased ore lands while unleased ore lands are not taxed. The law accords leased ore lands no special privileges. They require no more regulation or supervision by the State and receive no greater protection from it. The law gives the recipients of royalty no unusual right, remedy or security. The ore deposits of the State are no better preserved and are no sooner depleted by a lessee than by an owner mining his own property. Lands, by reason of being leased, contribute no more, nor any less, to the wealth of the State than unleased lands. It seems impossible to suggest, and, so far as we know, no one has suggested, any reason why leased ore lands should be subjected to two taxes while unleased lands are subjected to but one tax. The lower court evidently recognized this difficulty, but held that the unleased ore land is taxed by the occupation tax.

II

CONSIDERED AS A TAX ON MONEY

1. It was the purpose of the Legislature in passing Chapter 226 of the Laws of 1923 to impose a tax upon money.

2. Considered as a tax upon money it is invalid because:

(1) For the purpose of taxation all money is alike. It is incapable of classification.

(2) More specifically, the attempted classification is based upon the source or origin of the money, and no such classification is valid.

(3) The money received as royalty is taxed in a different and more burdensome manner than any other money. All money received as royalty is taxed at least once and part of it is taxed twice. No other money is taxed twice and only that part of all other money which is on hand May 1 in each year is taxed at all (Paragraph 7, Complaint, R. 23; Paragraph VII of Answer, R. 40; also R. 48 and R. 54).

1. The contention that the tax is upon money and not upon real estate was briefly stated in Section 1 of Division II of this brief (pages 20 to 22). What was said there will not be repeated.

The first section of the Act provides that *a tax "shall be levied and collected upon all royalty received during the year * * *."* The second section provides that the word *"royalty," "shall be construed to mean the amount in money or value of property received by any person having any right, title, or interest in or to any tract of land in this State for permission to explore, mine * * *"* etc.

In all the cases now before this court, and in nearly all other cases, the royalty is payable and is paid only in money. In all the cases before the court, the tax is therefore upon money only.

(1) If the tax is upon money, the arbitrary character of the classification is apparent. All money is alike. One dollar has the same value and has the same characteristics as every other dollar. Each dollar gives its owner the same ability to contribute to the revenue of the state as does every other dollar. A dollar received as royalty is no more valuable, gives no more ability to help bear the cost of government, and receives no more protection from the state than any other dollar. This kind of a tax is just as adaptable to money received as interest, or for services, as to money received as royalty. Money received from one source is indistinguishable from money received from any other source.

There are rare instances in which the owner of the land may be entitled to receive, in lieu of money, a part of the ore. If the royalty is received in ore, it is just like other ore. It has the same value as any other ore of like grade. A ton of ore received as royalty is no more valuable, and gives its owner no more ability to bear the cost of government, and requires no more protection than a like ton of ore mined by the owner from his own land.

(2) A classification of money or of ore with reference to its source is arbitrary and capricious.

People ex rel Phillips v. *Raynes*, 120 N. Y. Supplement 1053, is a well considered case in which it was expressly held that a privilege tax, the classification for which is based upon the origin of the goods dealt in, is void. This case was affirmed by the New York Court of Appeals without an opinion, as shown by a memorandum decision reported in 198 N. Y. 539, and a rehearing was denied by the Court of Appeals, 198 N. Y. 622.

The case involved a New York statute which provided that no person should sell convict-made goods without a license. The law was attacked upon the ground that it was an interference with interstate commerce, and that it violated the

equal protection clause of the Fourteenth Amendment. The court said, at page 1057:

> "While the taxing power may be extended to all kinds of persons and property within the state, or may be restricted to certain kinds, * * * it is subject to the one great rule that all persons, under like circumstances, shall be treated in the same way. Persons and property may be classified for taxation, but such classification may not be arbitrary, unreasonable, or capricious. * * * The appellants say that it (the statute) does not conflict with the rule of equality; that it puts into one classification all who deal in convict-made goods, and treats them all alike; and that this is a reasonable classification. Let us see. The classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves * * * if the purpose of the act, as is claimed, is to protect free labor from prison labor, why in these days of contest between organized and unorganized labor should not an act be passed which provided for such a license for selling goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such a license for such goods made in shops which employed union labor? * * *"

The court, after discussing various decisions by the New York Court of Appeals, said, at page 1059:

> "A classification by origin applied to a vast variety of goods seems to be more unreasonable than any enumerated by the Court of Appeals. So that, if we should hold that if the statute does not violate the interstate commerce clause of the Federal Constitution and does not, under the guise of a licensing act, practically prohibit the buying and selling within this state of goods, wares, and merchandise produced in another state, and look at it solely as a revenue act, we are forced to the conclusion that it is an unconstitutional exercise of legislative power, and hence invalid."

This case was cited, with apparent approval, in *People* v. *Goldfogle*, 205 N. Y. S., at 876, decided July 15, 1924.

If it is a tax on money, it is the money of those only who own an interest in leased ore lands that is taxed. A classification of money with reference to its receipt by persons having an interest in leased ore lands is wholly illusory.

(3) The money received as royalty is also taxed in a different and in a more burdensome manner than any other money. All the money received as royalty during the entire year is taxed although none of it may be on hand on May 1. In the case of all other money, none that is received during the entire year is taxed unless it is on hand on May 1 (Paragraph 7 of Complaint, R. 23; Paragraph VII of Answer, R. 40; also R. 48 and 54).

If the tax is on money, part of the money taxed is taxed twice, while other money is taxed but once. On May 1, 1923, the day for listing money for taxation, some of the plaintiffs in this case, and in other cases, had on hand large amounts of royalty received by them respectively in 1923, which they reported for taxation and on which they were taxed for that year under the law taxing money and credits (Agreed Statement of Facts, Paragraph 12, R. 54). This money was thus taxed twice in the same year by the same taxing authority, while money received from all other sources was subjected to but one tax. In like manner, if ore or other property is received as royalty, it is likely to be subject to two taxes while other ore is subject to but one tax.

III

CONSIDERED AS A TAX ON INCOME

1. The law is not an income tax law because:

(1) It does not conform to the common characteristics of all income tax laws.

(2) The tax is more of a tax on capital than on income.

2. If it is intended to be an income tax law, it is invalid because the tax is not uniform upon the entire class, income.

Before attempting to say whether this is an income tax law, it seems desirable to ascertain what are the usual or necessary characteristics of an income tax law.

Income is declared by the 1924 Federal Income Tax Law (Sec. 213) to include gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The Federal Income Tax Act of 1862 imposed a tax upon annual gains, profits or incomes, whether derived from any kind of property, rents, interest, dividends, salaries or from any profession, trade, employment or vocation. The Act of 1864 made the definition even more comprehensive. The Act of 1894 covered practically the same things that are covered by the Acts of 1913, 1916, 1917, 1918, 1921, and 1924.

The English income tax laws which were in force for nearly seventy years prior to the commencement of the Great War, covered a great variety of income, including that from lands, houses, government services, business and professions, mines, gas works, iron works, canals, quarries, markets, foreign securities, coupons, railways out of the United Kingdom, loans secured on rents, and all other interest and all other profits (Seligman, The Income Tax, pages 116 to 220).

The German income tax law covered net receipts "from capital, real estate, trade and industry, and lucrative occupations." (Seligman, page 251).

The French income tax law covered incomes from houses, land, movable capital, business profits, agricultural profits, wages and salaries, professional earnings and all other services (Seligman, page 321).

The Italian income tax law covered all incomes except those from properties subject to the real estate tax and except income from government securities (Seligman, page 341).

The income tax law of the Dominion of Canada contains a definition of income almost as comprehensive as that contained in our Federal Income Tax Act of 1924, and after specifying numerous kinds of income closes with the words: "and also the annual profit or gain from any other source."

At the time of the trial in the lower court there were income tax laws in at least fifteen states and in Hawaii and Porto Rico. In each of these states and in each of these Island Possessions, taxable income included a great variety of forms of income and in the greater number included practically the same forms of income as those covered by the Federal Income Tax Law of 1924.

In each of the federal income tax laws, in the Excise Tax Law of 1909, and in the law of each of the fifteen states, and in Hawaii and Porto Rico, provisions were made for certain deductions, usually of other taxes, expenses and interest paid. In most of them deductions were allowed for depreciation, which must be permitted if the tax is to be confined to income and not burden capital.

In the six most recently enacted Federal income tax laws, and in at least seven of the state laws (those of New York, Oregon, North Carolina, Oklahoma, Wisconsin, Massachusetts, and Missouri), deductions were permitted on account of the depletion of natural resources. (The Oregon law has been held unconstitutional.) In the English income tax laws there was a provision which accomplished the same purpose as the provisions for a deduction on account of depletion.

It is a common characteristic of income tax laws to impose a tax upon practically all forms of income, and to allow all deductions necessary to make the tax as nearly as possible a tax upon net income. (The Arkansas law is an exception. The tax is upon gross income.) It is also a common characteristic of income tax laws that the taxpayer be permitted to recover the entire amount of his investment without liability to tax. Otherwise, the tax is one upon capital as well as upon income. It is also a common characteristic of income tax laws that a deduction of losses be permitted.

In a note to the report of the decision in the case of *Atlantic Coast Line Railroad Company* v. *Daughten*, 262 U. S. 413, 422, it is said:

> "Every income tax act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation."

If the Act under consideration in this case imposes a tax on income, then it excludes from its operation all the long list of items mentioned in the 1924 Federal Income Tax Law, except rents, and excludes nearly all rents. It excludes even royalties from gravel leases which, considered as income, are in no manner distinguishable from royalties from leases of iron ore. It excludes gains, profits and income derived from salaries, wages, and compensation for personal service, from professions, vocations, trades, businesses, commerce and sales, from dealings in property, from interest, dividends and securities, from the transaction of all business carried on for gain or profit, and excludes gains, profits and income from every source except only rents from leased ore lands. It omits all income arising in any manner out of the ownership or sale of unleased ore lands. It includes and applies solely to the gross rental arising from leased ore lands.

Royalty received from ore lands is included in any idea of gross income, but that is not to say that a law imposing a

tax upon royalty received and upon nothing else is an income tax law, nor to say that the tax is a tax upon income as such. One single member of the very large class of property called income is subject to this tax.

It is not consistent with any ordinary idea of an income tax law to say that this is such a law.

Furthermore, the tax imposed by this Act is levied indiscriminately upon capital and income.

The mining of the ore for which the royalty is paid constantly lessens and ultimately exhausts the value of the property. Royalty paid on account of ore actually mined is necessarily a return of capital at least in part. Usually a large part of it is a return of capital. Sometimes all of it is a return of capital. When the mining operation has been completed, the mine is of no value. In the case of the open pit mine even the surface of the land is removed and its value entirely destroyed. The use of a farm for which rent is paid under a farm lease, or ground for which rent is paid under a ground lease, does not lessen the value of the leased premises. It may increase it. The case of the Merrimac Mining Company now before this court illustrates the point. The Merrimac Mining Company paid $30,000 in cash for a third interest in the fee title to the Meacham Mine, which was then subject to lease. The quantity of ore in the mine had been determined. The purchasers believed that they would get back the purchase price with interest at 6% per annum. But the ore has not been mined so rapidly as was expected and the royalties, therefore, have not been paid so rapidly as expected. It is no longer reasonably certain that the company will get back the $30,000 with interest at 6% (R. 72). The Act of 1923, if valid, will require the company to pay a tax of 6% upon the entire capital invested in the mine as well as upon the profits, if any. This is a case actually before the court. There are, no doubt, many cases in which the investor will fail to get back the principal amount invested.

Nevertheless this Act will impose a tax upon the entire amount received. In such case, the tax will be a tax upon capital and upon nothing else.

Income, of course, constitutes a class of property different from any other class. If the Legislature has the power to impose an income tax, it must be uniform upon the entire class constituting income, unless there is some sound basis for a sub-classification or sub-division of the class. Otherwise, the provision of the Minnesota Constitution which requires taxes to be uniform on the same class of subjects is violated and the taxpayer is deprived of the equal protection of the laws.

The Legislature of the State of Minnesota, by Chapter 532 of the Laws of 1919, proposed to the people an amendment to Section 1 of Article 9 of the Constitution by adding thereto, among other things, the following:

> "Taxes may be imposed on incomes, privileges and occupations which taxes may be graduated and progressive and the exemption of a reasonable amount of income from taxation may be provided, and such taxes may be in lieu of taxes on any class or classes of personal property as the Legislature may determine."

This was apparently in recognition of the fact that under the Constitution as it exists the Legislature has no power to impose a graduated or progressive income tax and no power to make any exemptions. The people rejected the amendment and no such amendment has ever been adopted.

If this is to be considered an income tax law, an entirely novel classification was attempted. So far as we can ascertain, no other legislative body ever attempted to impose an income tax upon one single item of income, leaving all other items free from the tax. Out of the great variety of forms of income, it selected, not a class, but an item.

IV

CONSIDERED AS AN OCCUPATION TAX

The Act contains no language indicating any purpose on the part of the Legislature to impose an occupation tax, and the tax has none of the usual incidents of an occupation tax.

The Legislature was entirely familiar with the language ordinarily used in an act intended to impose an occupation tax, and used such language in Chapter 223 of the Laws of 1921. That act provides:

> "Every person engaged in the business of mining or producing iron ore, or other ore, in this state shall pay to the State of Minnesota an occupation tax * * *."

The language of the Act under consideration is very different. It provides:

> "There shall be levied and collected upon all royalty received * * * a tax * * *."

If the Legislature had intended the tax under consideration to be one upon an occupation, it would naturally have used such language as is usually employed in imposing occupation taxes. This is especially true in a state like Minnesota where, at the time of the adoption of the 1923 Act, there was but one occupation tax.

V

CONSIDERED AS SOME OTHER FORM OF AN EXCISE TAX

There were suggestions in the lower court that the tax might be some other form of excise tax. It was referred to more specifically as a privilege tax.

Appellants contend that the tax was not laid as a privilege tax:

1. The Act contains no language indicating any purpose on the part of the Legislature to impose a privilege tax.

2. Construed as an Act imposing a tax upon the privilege of leasing lands, it is retroactive and the plain terms of the statute forbid the construction that it was intended to impose a tax upon the past transaction of making a lease.

3. A privilege tax is usually imposed upon a privilege which the taxpayer is free to exercise or not. In the case of leases made before the passage of the Act, the taxpayer has no such freedom.

4. Even if the tax were in the form of a privilege tax, it would nevertheless be in substance a tax upon property.

1. There is nothing in the language of the Act to indicate a purpose to impose any variety of an excise tax. There is nothing to indicate that either the "business" or "occupation" or "privilege" of receiving royalty, or the "business" or "occupation" or "privilege" of leasing lands, is to be taxed. Only royalty is taxed, royalty being defined to mean the amount in money or value of property received by a person having an interest in land for permission to explore it, or mine ore.

2. Considered as an Act imposing a tax upon the privilege of leasing lands, it is retroactive in its effect because the evident purpose of the Legislature was to tax royalties received pursuant to leases made prior to the passage of the law as well as those received pursuant to leases made after its passage.

All the leases involved in the cases before the court were made before the passage of the law. One of the leases in this case was made in 1898 (R. 53). In the case of the Merrimac Mining Company, the lease was made by the plaintiff's grantor. In some of the cases, the leases were made by the plaintiff's ancestor. It is very improbable that the Legislature intended to impose a tax upon the privilege of making a lease twenty-five years before the law was passed. It might as well

attempt to impose a tax upon the privilege of occupying land, or farming it, or selling it, twenty-five years before the law was passed. It might as well attempt to impose a tax upon contracts for the sale of stock upon a stock exchange many years before the law was passed. It seems very improbable that the Legislature intended to impose a tax upon a plaintiff on account of a privilege exercised by his grantor or by his ancestor. The New York Court of Appeals, in the case of *People* v. *Trust Company*, 205 N. Y. 74, 77, said that the Legislature cannot impose an excise tax on account of a transaction which at the time it was effected was subject to no tax. It has frequently been held that the Legislature cannot impose a tax upon an inheritance which was vested prior to the enactment of the law. It does not seem necessary, however, to discuss the question of the power of the Legislature. The matter may rest upon the construction of the law. The Supreme Court of Minnesota, in the case of *Builders' etc. Co.* v. *Compensation Insurance Board*, 151 Minn. 427, 430, said:

> "It is thoroughly settled that a statute will not be given a retroactive operation unless it appears 'by express command or by necessary and unavoidable implication' that such was the legislative intent."

This statement was quoted with approval in the case of *State* v. *Crete Mining Co.*, 204 N. W. 932, Supra. That case applies said rule of construction to the occupation tax Act of 1921.

The plain purpose of the Act of 1923 is to tax the money received pursuant to the terms of the leases, not to tax the past transaction of making the leases. It is a property tax, not a privilege tax.

3. A privilege tax is usually imposed upon a privilege which the taxpayer is free to exercise or not. In the case of leases made before the passage of the Act, the taxpayer has no such freedom. He is bound by the contracts entered into long prior to the passage of the law, and, as elsewhere stated, he is

receiving the payments which are due to him under the terms of the contract. He is exercising a property right and not a privilege.

4. Even if the tax were in form upon the receipt of royalty, or upon the privilege of receiving it, or upon the privilege of leasing land, it would, in substance, be a tax upon property. The right to lease land and to receive rent or royalty from it is one of the essential elements of ownership, and a tax on account of an essential element of ownership is a tax on account of ownership, and that, according to all the authorities, is a tax upon the property itself.

Thompson v. *McLeod*, 112 Miss. 383, 387.

The act under consideration in that case was called an annual privilege tax or occupation fee upon all persons pursuing the business of extracting turpentine from standing trees. The complainant was the owner of turpentine distilleries and was engaged in the extraction of gum from trees which he owned or held under lease, and distilling it into turpentine. The court said:

> "* * * It is manifest that the tax enacted by the Act under review operates, and can only operate, as a property tax, and is really not a privilege tax. * * * the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees to extract turpentine from standing trees. * * * It is true the act in other language refers to it as a business—'a business of extracting turpentine from standing trees.' The imposition of such a tax is not on a business, but on the property involved."

Thompson v. *Kreutzer*, 112 Miss. 165, 167.

The act under consideration was one whereby there was levied an annual privilege tax or occupation fee of twenty cents per acre upon each person owning more than one thousand acres of timber land. The validity of the act was attacked upon

the ground that it was a property tax and that the constitution of the state provided that property shall be taxed in proportion to its value. The Attorney General contended that the tax was upon the privilege of ownership. The court said:

> "Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. * * * In a strictly legal sense, 'property' * * * is synonymous with the 'right of ownership' and means one's exclusive right of possessing, enjoying and disposing of a thing. * * * A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute is a tax on the thing itself."

These cases were cited with approval in the case of *Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, 294. The tax in that case was said to be upon the occupation of removing whisky from storage in bonded warehouses. This court said:

> "But, as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e. consumption, sale or keeping for future consumption or sale. The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it and *to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property.*"
>
> *Craig* v. *Taylor*, 192 Kentucky 36, 39.

The state court was construing the same statute that was before this court in the Dawson case, and, among other things, said:

> "The mere right to own and hold property cannot be made the subject of excise since the levying of the tax by reason of ownership of property is to tax the property."

It must be equally clear that the mere exercise of the usual rights of ownership, such as leasing or occupying land,

can no more be made the subject of an occupation or other privilege tax than can the ownership itself. To tax the usual and necessary incidents of ownership is to tax the ownership, and that is to tax the property. All such taxes are property taxes.

The matter is briefly stated in 26 R. C. L. Section 209, at page 236:

> "The mere right to own and hold property cannot be made the subject of excise, and since the right to receive income from property is the chief attribute of ownership, the act or privilege of receiving income from property cannot be made the subject of an excise tax."

The provision of Section 8 of the Act, to the effect that the situs of royalty for all purposes of the Act shall be in the State of Minnesota, is a further indication that the Legislature intended the tax to be imposed upon property.

The plaintiffs in the cases now before the court are only receiving payment of obligations due them prior to the adoption of the statute. They are receiving only the consideration for the right to use the land. In all the cases involving this tax now before this court, the right of the fee owner to use the land for the mining of ore was parted with long before the adoption of this statute, and the royalty is only the consideration to which the fee owner is entitled by virtue of the contract made long ago with the lessee. The receipt of payment of an obligation to pay money is an exercise of the right of ownership of the obligation, and any tax upon the right to receive what is due one is a tax upon property. The right to receive royalty payable under contracts made before the adoption of the statute is a property right and not a "privilege." A tax upon the royalty received is as much a tax upon property as is a tax upon money received in the repayment of money loaned. It is as much a tax on property as is a tax upon the right to take one's property out of storage. Such a right may be subjected to a tax which is uniform upon all property of the same kind, but it cannot be made the subject of a privilege tax, as may the right to receive an inheritance.

VI

THE HEISLER CASE

In the lower court counsel for the State relied largely on the case of *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245. The statute there under consideration imposed a tax upon each ton of anthracite coal mined, "washed, or screened, or otherwise prepared for market." It was a personal property tax and nothing else. No similar tax was imposed upon bituminous coal. The statute was attacked upon the ground that there were not sufficient differences between anthracite and bituminous coal to warrant their separate classification. Evidence was offered at the trial, and the trial court found in great detail the many differences between the two kinds of coal. This court discussed the differences and said that they are great and important and are a just basis for their different classification. The differences are inherent in the coals themselves. In the present case there are no differences between the leased ore lands which are taxed and the unleased ore lands which are not taxed. There is no difference between the undivided interest in a parcel of land which is leased and taxed and the undivided interest in the same parcel of land which is not leased and is not taxed. There are not two kinds of property. It is all the same.

VII

CONCLUSION

In conclusion we submit that it clearly appears that it was not the purpose of the law to impose any form of excise tax. It was the purpose of the Legislature to impose a property tax. The Act cannot be sustained as one imposing a tax upon property for the reason that it violates the equal protection and uniformity clauses of the Federal and State Constitutions, whether

the tax be considered as one upon real estate, upon money, upon income, or upon any other form of property. It does not apply equally to any possible class of any kind of property.

The decision of the District Court should be reversed and the relief prayed for by the Appellants should be granted.

Respectfully submitted,

J. W. HUNT,

W. D. BAILEY,

Solicitors for Appellant.

APPENDIX

Chapter 226, Laws of Minnesota, 1923

CHAPTER 226—H. F. No. 29

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. **Tax on iron ore royalties—Rate.**—There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

Sec. 2. **Definitions.**—For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, copartnerships, associations, companies and corporations.

Sec. 3. **Annual reports to tax commission.**—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

Sec. 4. **Contents of reports.**—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.

2. The amount of royalty paid on each tract of land separately.

3. The name and post office address of each person to whom royalty is paid, and

4. Such other information as said commission may require.

Sec. 5. **Tax commission to assess tax.**—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. **Penalties for non-payment.**—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. **Date of payment.**—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. **Tax a lien on lands and ore.**—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. **Auditor to make draft.**—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

Sec. 10. **Treasurer to collect tax.**—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11. **Penalties for false returns.**—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. **Records to be open to inspection of tax commission—Violations and penalties.**—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. **Taxes to be paid into general revenue fund.**—All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 471.

HELEN P. BARDWELL, HARRIOT P. AYER and ALICE P. FOREMAN, *Plaintiffs and Appellants,*

vs.

SARGENT LAND COMPANY, a corporation; SAMUEL LORD, JAMES G. ARMSON and CHRIS HALDEN, as constituting the MINNESOTA TAX COMMISSION; CLIFFORD L. HILTON as Attorney General of Minnesota; RAYMOND P. CHASE as State Auditor of Minnesota; and HENRY REHER as State Treasurer of Minnesota, *Defendants and Respondents.*

BRIEF FOR APPELLANTS.

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EDWARD C. GALE,
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The decision and opinion of the court below in this case has not been reported as yet.

JURISDICTION OF THE COURT

(1) This case comes up on appeal by the plaintiffs from a decree of the United States District Court for the District of Minnesota, 5th division, made and entered January 15, 1925 (R. 74).

(2) This is a suit in equity brought in the District Court by the plaintiffs who are citizens and residents of the States of Massachusetts and California, and stockholders in defendant Sargent Land Company (R. 59), to restrain said company and its officers from paying an alleged illegal tax, threatened to be levied upon property of the Corporation under the provisions of Chapter 226 of the laws of 1923 of the State of Minnesota (R. 42). The Corporation was organized, and exists under the laws of Minnesota, and is domiciled therein (R. 59).

The specific claims of the defendants are: that said Chapter 226 is unconstitutional and void, as transcending the provisions of Sec. 1 of Art. 9 of the Constitution of Minnesota, that "taxes shall be uniform upon the same class of subjects"; also Sections 33 and 34 of Art. 4 of said Constitution prohibiting special legislation and requiring all laws to be uniform in their operation throughout the State; also Sec. 7 of Art. 1 of said Constitution, that "no person shall be deprived of life, liberty or property without due process of law"; also the provisions of Sec. 13 of Art. 1 of said Constitution, that "private property shall not be taken, destroyed or damaged for public use without compensation therefor first paid or secured." Plaintiffs further claim that said Act violates the 5th Amendment of the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation, and the provisions of the 14th Amendment to the Constitution of the United States, that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (Par. 11, R. 4-5).

(3) The amount in controversy exceeds three thousand dollars ($3,000) (R. 59). The defendants other than said Corporation are officers and officials of the State of Minnesota (R. 60), who threaten to, and will unless restrained by the court, enforce collection of the tax (R. 64 (20)). The officers and agents of the corporation likewise threaten to, and will unless restrained by the court, pay any tax so levied (R. 64 (b)), and irreparable injury will result which can not be compensated by an action at law (R. 65).

(4) The court below had, and recognized, jurisdiction of the suit upon the grounds, (a) that the matter in controversy exceeds, exclusive of interests and costs, the sum or value of three thousand dollars ($3,000); (b) that the suit involves the constitutionality of Chapter 226 of the laws of 1923 of the State of Minnesota, which purports to impose a tax of six per cent (6%) upon all royalties received for permission to explore, mine, take out and remove iron ore from lands in the State of Minnesota, which Chapter is asserted to be invalid as in violation of the 5th Amendment of the Constitution of the United States, providing that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation; and in violation of the 14th Amendment of the Constitution of the United States, providing that no State shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; (c) that the controversy is between citizens of different states.

Judicial Code, Sec. 24.

(5) This court has jurisdiction of the appeal under the provisions of Judicial Code, Sec. 238, inasmuch as the case involves the construction or application of the 5th and 14th Amendments of the Constitution of the United States, the lower court in its decree having held that the Act referred to is not in violation of said Amendments (R. 66, 67, 68, 70, 73).

Loeb vs. Trustees of Columbia Township, 179 U. S., 472.

Fidelity Mutual Life Ass'n. vs. Mettler, 185 U. S., 308.

Davis & Farnum vs. Los Angeles, 189 U. S., 207.

Dawson vs. Kentucky Distilleries, 255 U. S., 288.

Brushaber vs. Union Pac. R. R., 240 U. S., 1.

Nevada Cal. Coal Co. vs. Hamilton, 235 Fed., 317, 339.

Oliver Mining Co. vs. Lord, 262 U. S., 172.

(6) An illegal tax paid even under protest can not be, in Minnesota, recovered back (R. 65 (21)).

In re Delinquent Taxes, 155 Minn., 258, 262.

STATEMENT OF CASE.

In 1923 and for some years prior thereto all tangible property in Minnesota has been subject to a general *ad valorem* tax and has been classified by the Legislature into four classes with a graduated rate of assessment as follows:

1. Iron ore whether mined or unmined to be assessed at 50% of its true and full value;
2. All household goods at 25% of their true and full value;
3. All live stock, agricultural products, merchandise and unplatted real estate at 33⅓% of their true and full value;
4. All other property at 40% (R. 46).

Minnesota has never had a State income tax.

There has existed, however, during the period in question a "Moneys and Credit" tax of three mills on the dollar upon cash in hand, bank deposits and all choses in action (R. 47).

Conceiving that the iron mining industry of the State could and should bear a still greater proportion of the tax burden, the Legislature of Minnesota in 1921 enacted Chapter 223 of the Laws of that year levying a tax of six per cent as an additional tax in the nature of an excise or occupational tax upon the mining industry of the State. That tax has been reviewed by this Court and its validity sustained, with qualifications.

Oliver Iron Mining Co. vs. Lord, 262 U. S. 172.

It is the only occupational tax in Minnesota.

In 1923 the Legislature deeming the way open for a still further tax upon the mining interests of the State enacted Chapter 226 of the Laws of Minnesota entitled "An Act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this State for permission to explore, mine, take out and remove ore from the same" (R. 42). As before stated this action is a suit in equity brought by plaintiffs as stockholders against the Sargent Land Company to restrain the corporation from paying, and the other defendants who are officers of the State of Minnesota from

enforcing, the tax attempted to be levied under this Act. Such facts as are pertinent to the issues of the case are set out in an agreed statement of facts (R. 59).

Briefly, the Sargent Land Company was organized for the sole purpose of receiving and uniting in one ownership title to certain lands in Minnesota until then held by its numerous stockholders in undivided fractional shares, and of liquidating and converting the same into money for distribution to its stockholders, all of which its Articles of Incorporation specifically recite (R. 59). Pursuant to such purpose it became and now is the owner in fee of certain mineral lands in Minnesota by conveyance from those persons who are now its stockholders, some of which lands are leased, some not; and the iron ore in still others sold under sale-contracts. From the lands so leased and from the lands in which the iron ore has been sold under sales contracts the corporation received in the year 1923, and will continue to receive, substantial sums of money by way of royalties or as installments of purchase price on iron ore sold; and it is on these royalties and installments of purchase price that the tax in question is attempted to be levied. The corporation is not authorized to engage in the business of mining and has never engaged in such (R. 60). It is the same corporation respondent in the case of *von Baumbach vs. Sargent Land Co.*, 242 U. S. 503, in which was involved chiefly the question of royalties as income under the Federal Corporation Tax Act of 1909.

The basis for the instant suit is that the taxing Act in question is unconstitutional and void in that it violates those constitutional clauses of the State of Minnesota or of the United States providing that all taxes shall be uniform upon the same class of subjects, prohibiting special legislation, and providing that no person shall be deprived of property without due process of law.

In addition to these constitutional questions, there is involved in this case, but not in the other cases on appeal in this Court relating to the Act in question, a further question of construction of the Act, should its validity be sustained by this Court.

Some of the revenues of defendant Sargent Land Company threatened to be taxed under the Act in question are derived from a certain "Sale Contract of Ore" (R. 23), and it is the contention of plaintiffs that the receipts from this source are not within the intent and meaning of the Act.

The further question is involved also in this case whether certain royalties received by defendant Sargent Land Company in 1923 for ore mined and removed in 1922 prior to the passage of the Act, and certain other royalties due in October, 1922, but not in fact paid until 1923, are or can be taxable under this Act.

There has been no decision of the Supreme Court of the State of Minnesota nor of any court of that State respecting the Act in question.

ASSIGNMENTS OF ERROR URGED

(1) The Court erred in holding that Chapter 226 of the laws of Minnesota for 1923 does not violate Section 1 of Article 9 of the Constitution of Minnesota, requiring that taxes shall be uniform upon the same class of subjects.

(2) The Court erred in holding that said Chapter 226 does not violate Sections 33 and 34 of Article 4 of the Constitution of Minnesota, prohibiting special legislation.

(3) The Court erred in holding that said Chapter 226 does not violate Section 7 of Article 1 of the Constitution of Minnesota, providing that no person shall be deprived of property without due process of law.

(4) The Court erred in holding that said Chapter 226 does not violate Section 13 of Article 1 of the Constitution of Minnesota, providing that private property shall not be taken for public use without just compensation.

(5) The Court erred in holding that said Chapter 226 does not violate the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the State of Minnesota the equal protection of the laws.

(6) The Court erred in holding that said Chapter 226 is not in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, that no state shall deprive any person of property without due process of law.

(7) The Court erred in holding that said Chapter 226 is a valid and enforcible law.

(8) The Court erred in holding that the tax sought to be established by said Chapter 226 is lawful and enforcible.

(9) The Court erred in holding that the tax imposed by said Chapter 226 upon "royalties" is a valid tax upon the interest in the land of the person or persons entitled to receive such royalties for permission to explore, mine, take out and remove ore from land in the State of Minnesota.

(10) The Court erred in holding that the classification for

taxation of such "royalties" separately from other rents derived from land in the State of Minnesota is reasonable and valid.

(11) The Court erred in holding that the classification for taxation of such "royalties" separately from other moneys belonging to the taxpayer is reasonable or valid.

(12) The Court erred in holding that said Chapter 226 is uniform in its tax imposition and burden upon the same class of subjects.

(13) The Court erred in holding that the depletion of the value of mineral lands by removal of ores therefrom constitutes a lawful basis for discrimination against, or separate classification of, such property in respect of taxation.

(14) The Court erred in holding that the depletion of the value of mineral lands by the removal of ores therefrom, constitutes a valid basis for the taxation of royalties paid or received for permission to explore, mine, take out and remove ore from such lands.

(15) The Court erred in holding that the fact that practically all of the iron ore mined in Minnesota is transported beyond the limits of the State, constitutes a lawful basis for the separate classification for taxation of royalties paid or received for permission to explore, mine, take out and remove such ore from land in Minnesota, or for taxation of any interest in such land.

(16) The Court erred in holding that installments of purchase money received by a vendor for the sale of iron ore in place in lands in Minnesota are "royalties" within the purview of said Chapter 226, and taxable thereunder, even if said law be valid and enforcible as respects royalties paid and received for permission to explore, mine, take out and remove ore from land in Minnesota.

(17) The Court erred in denying to the plaintiffs the relief sought by them in this action, and every part thereof, and in entering a decree dismissing the bill of complaint.

Summary of Argument

I. Nature of Tax discussed (p. 15).
First: As an Excise or Occupational tax (p. 16).
Second: As an Income or Property Tax (p. 18).

II. The Act is invalid in any case for lack of proper classification required by the State and Federal Constitutions (p. 20).

III. The Act is invalid for lack of proper uniformity of treatment among members of the same class (p. 34).

IV. The Act does not and cannot apply in any event to royalties for ore mined prior to January 1st, 1923; nor to royalties due prior to that date though paid afterward (p. 40).

V. Even if the Act be valid, moneys received under the "Sale-Contract" (Exhibit 2) in this case are not taxable under the terms of the Act (p. 49).

What is royalty (p. 52).

The contract for sale of ore (p. 59).

Detailed provisions of Exhibit 2 (p. 61).

Intention of parties must prevail (p. 71).

Concerning Mining Leases (p. 72).

Interpretation of Exhibit 2 (p. 75).

Decree must be reversed or modified (p. 93).

ARGUMENT.

POINT I.

NATURE OF TAX.

The Act in question is entitled "An Act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this State for permission to explore, mine, take out and remove ore from the same." Section 1 provides: "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine, take out and remove ore from land in this State a tax of 6%." Section 2 provides: "For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out and remove ore therefrom, and the word 'person' shall be construed to include individuals, co-partnerships, associations, companies and corporations." Section 8 provides "The situs of royalty for all purposes of this Act shall be in this State and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is based."

Other provisions of the Act are administrative leading up to a personal judgment in the District Court in case the tax be not paid, which judgment "shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed."

Before determining the validity of this unusual taxing Act, and so far as we are aware it is not only the first of its kind in Minnesota but the first anywhere, it is desirable, if indeed not

essential, to determine the nature of the tax attempted to be levied. Whether it offends against the Constitutional guarantees of uniformiy and classification depends upon the class of subjects intended to be reached. The tax styles itself, "tax on royalty," and royalty is defined to mean "the amount in money or value of property received.... for permission to explore, mine, take out and remove ore." It is not necessary to call attention to the fact that "this Court is not bound by names but will determine the nature of a tax for itself" in its effort to ascertain the subject of the tax.

New York Tel. Co. vs. Dolan, 265 U. S. 96.

The nature of a tax depends "upon the mission given it by the law under which it is levied" and the phraseology is not controlling.

In re Skelton, 197 Pac. Rep. 495 (Okl.).

This Court has been called upon many times to discuss the nature of a proposed taxing Act in the determination of its constitutionality. The following are instances:

Dawson vs. Kentucky Distilleries, 255 U. S. 288.
Zonne vs. Minneapolis Syndicate, 220 U. S. 187.
Pollock vs. Farmers Loan & Trust Company, 157 U. S. 429.
Philadelphia Company vs. Pennsylvania, 122 U. S. 326.
Watson vs. State Comptroller, 254 U. S. 122.
Flint vs. Stone Tracy Company, 220 U. S. 107.

FIRST: IS THE TAX IN QUESTION AN EXCISE OR OCCUPATIONAL TAX?

An affirmative answer to this question is not decisive of plaintiff's case, for even if the tax be held an occupational tax, it is still subject to the defect of lack of proper classification and uniformity to be later discussed. Nevertheless, it may be doubted whether the tax can be of that nature. The mere right to own and hold property cannot be made the subject of excise.

Nor can the mere act of receiving royalty or of giving permission to mine ore from one's own land amount to a business or occupation such as can be reached by the taxing power under the guise of an occupational tax.

"What is land but the profit thereof." 1 *Coke on Lit.*, 45.

We shall not discuss in detail but will simply cite the many cases in this and other courts in which taxing Acts purporting to tax the various rights inherent in ownership have repeatedly been held void, or at least something else than an excise or occupational tax.

Dawson vs. Kentucky Distilleries, 255 U. S. 288.
Thompson vs. McLeod, 112 Miss. 383.
Thompson vs. Kreutzer, 112 Miss. 165.
Craig vs. Taylor, 232 S. W. Rep. 395 (Ky. 1921).
State vs. Gillespie, 197 Pac. Rep. 508 (Okl.).
In re Skelton Company, 197 Pac. Rep. 495 (Okl.).
Gillespie vs Oklahoma, 257 U. S. 501.
Pollock vs. Farmers Loan & Trust Company, 157 U. S. 429.
Parker vs. Insurance Company, 42 La. Ann. 428.

Mere ownership of land does not constitute doing business.
Cambria Steel Company vs. McCoach, 225 Fed. Rep. 276.

Nor would it seem that an excise tax can be laid upon a land owner merely by reason of his exercising the rights of ownership and disposing, either by sale, lease, license or otherwise, of his property interest therein.

The Act in question further lays its taxing hand upon a single "permission" or upon a single royalty payment. The granting of a single "permission" or a single receipt of money is as much within the scope of the Act as a thousand receipts and a thousand leases. It must be therefore something else than the *business* of receiving royalty or the *occupation* of giving permission to mine which is intended to be reached by the Act.

Moreover, a privilege, when once exercised, is *functus officio,* and is not capable of re-exercise as respects any specific contract. What was a lawful exercise of the privilege at the time the contract was entered into, cannot be taxed twenty years hence. Even if Chapter 226 be valid as an excise tax law as respects grants of permission to mine and remove ore thereafter, all such agreements made prior thereto must be unaffected thereby.

Lewellyn vs. Frick U. S. Sup. Ct., 15 Adv. Op. 585.

State vs. Crete Mining Co. (Minn.), 204 N. W. Rep. 932.

It is to be noted further, that, if an excise tax, it cannot be made to operate against non-residents as the privilege or act of leasing or executing instruments may be just as well exercised or performed *outside* the State of Minnesota even though the lands be located therein.

Shepard vs. State of Wisconsin, 197 N. W. Rep. 344.

SECOND: IS THE TAX THEN AN INCOME TAX OR IS IT A PROPERTY TAX?

If an income tax, we may note in passing that it is most unjust in that it is laid on gross receipts without deduction for capital return, expenses of operation or administration. "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets."

Eisner vs. Macomber, 252 U. S. 207.

Merchants Loan & Trust Co. vs. Smietanka, 255 U. S. 518.

In 1923 when Chapter 226 was enacted, depletion in the nature of a return of invested capital as of March 1, 1913, was recognized by Section 214 (a) 10 of the Federal Revenue Act of 1921, and outlays in the nature of expenses incurred in checking royalty payments against ore actually mined, under rulings of the Internal Revenue Department, were allowed in ascertaining the gain or income received by a taxpayer from royalties paid to

him. Considering these facts and the fact that the sum total of royalties received may conceivably in a given case be less than the original capital invested, involving a loss rather than a gain as a result of the entire transaction, it can hardly be believed that the Legislature intended this to be an income tax.

But these plaintiffs are not particularly concerned whether the tax be of the nature of an income tax or a property tax; and, if a property tax, whether the property taxed be royalty in the sense of the money itself *in specie,* or whether it be the land or whether it be a particular interest in land. The learned trial judge in his memorandum seemingly has reached the conclusion that it is "essentially a tax upon the interest in the land owned by the person by whom the tax should be paid.....The amount of the royalty is the basis to be used in the computation of the tax" (R. 73). If it be a tax on such special interest in land, the Act creates a new and unnamed interest in real property hitherto unknown to the law; and the tax differs fundamentally from other real estate taxes in Minnesota, which are based on the *true value* of the real estate including every interest therein as ascertained and determined by official assessors and Boards of Equalization. Another fundamental difference to be noted is that other real estate taxes in Minnesota are assessed *against the land* and are enforced by proceedings *in rem,* while the tax under this Act is apparently assessed against the owner in his personal capacity and enforced by a suit *in personam,* similar to other personal property taxes.

State, ex rel Vossen vs. Eberhard, 90 Minn. 120.

POINT II.

THE ACT IS INVALID IN ANY CASE FOR LACK OF PROPER CLASSIFICATION REQUIRED BOTH BY THE STATE AND THE FEDERAL CONSTITUTIONS.

In discussing the uniformity and classification required by the State and Federal Constitutions we conceive it makes but little difference to which general class this tax be assigned or what name be given it—whether excise or income or property tax. If it be an excise tax, it is a tax on the particular occupation of granting permission, or of receiving royalties for the permission so granted, to mine ore. If it be an income tax, and even if income generally may be made the subject of separate classifications, the subject of this tax is that particular income which as royalty is derived from permission to mine ore. If it be a property tax on money in specie, it is likewise a tax on that particular money derived as royalty from the same source. If it be a property tax on land, it is a tax upon that particular kind of land which produces a royalty from permission to mine ore. If it be, finally, a property tax on an interest in land, it is a tax upon that special and particular interest in land owned by a person who receives a royalty for permission to mine ore therefrom.

One refinement in classification after another characterizes each of these definitions and *they are the same refinements.* The ultimate subdivision, the irreducible characteristic reached at last in every case and common to all is the "permission to mine ore" resulting in "royalty."

In other words what in the last analysis is really taxed is that particular occupation which engages itself in granting "permission," or in the receiving of royalty for "permission," to mine ore; *or* that particular income which is royalty received from such "permission"; *or* that particular money or "value of property" reduced to money received as royalty from such "permission"; *or* that particular kind of land from which a royalty is received for

such "permission"; *or* finally that particular and special ownership interest in land which produces royalty from such "permission" to mine ore. It is clear that the precise thing which the Legislature really had in mind to tax is this highly specialized thing, royalty, even if it be far from clear what legal method the Legislature had in mind in getting at it. At any rate, all the possible classifications of the Act come to this same end.

Has the Legislature in this classification overstepped its constitutional limitations? The constitutional guarantees of the State of Minnesota urged in this case are that taxes shall be uniform upon the same class of subjects (Art. 9, Sec. 1); that no person shall be deprived of life, liberty or property without due process of law (Art. 1, Sec. 7), and that when a general law can be made applicable no special law shall be enacted (Art. 4, Sec. 33). The constitutional guaranty of the Constitution of the United States also urged by plaintiffs is the 14th Amendment that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. All these guarantees, State and Federal, run more or less parallel. They may be considered together so far as this case is concerned under a general discussion of the uniformity and classification which they require or restrict, as the case may be, in order properly to protect the individual against the arbitrary or tyrannical exercise of power by the majority under the guise of law.

This is not a new thing and we shall not burden the Court with all the citations upon the subject. Suffice it to say that the legislature has not unrestricted power of classification. Thus, in *Gulf etc. Railway Co. vs. Ellis*, 165 U. S. 150, the Court said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the

attempted classification—and is not a mere arbitrary selection."

Again in *Southern Ry. Co. vs. Greene,* 216 U. S. 400, we find:

"While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect of which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. *Arbitrary* selection, it has been said, cannot be justified by calling it classification."

In the leading case of *Citizens Telephone Co. vs. Fuller,* 229 U. S. 322, the Court after reviewing previous cases sums up the matter as follows:

"These cases illustrate the power of the Legislature of the State over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. * * * Granting the power of classification we must grant government the right to select the differences upon which the classification shall be based and they need not be great or conspicuous. * * * The State is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in clear and hostile discriminations between particular persons and classes."

So in Minnesota the court in the leading case of *State vs. Brown,* 97 Minn. 402, said:

"The general principles which underlie and control the theory of permissible classification are now well settled in this State. The basis of classification must not be arbitrary or illusory. Having reference to the particular legislation, there must be some substantial distinction which suggests a reasonable necessity or propriety for different laws for the objects or places embraced within or excluded from the class. There must be something suggested by a difference in the situation and circumstances of the subjects placed in different classes, which discloses the necessity or propriety for different legislation in respect thereto. The classification must be founded upon legitimate differences in situation,

population, or inherent condition. The places or things included must have some characteristics or peculiarities distinguishing them from those which are excluded. The basis must be sufficiently broad to include all subjects whose conditions and wants render such legislation equally appropriate."

In *Mutual Benefit Co. vs. County of Martin*, 104 Minn. 179, sustaining the validity of a special mortgage registry tax law, the Court makes this definition:

> "The classification must be reasonable and such as is suggested by essential differences of nature, situation or circumstances, or by characteristics, which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, *and impracticable to apply thereto the ordinary methods of taxation.*"

In *Dohs vs. Holm*, 152 Minn. 529, the Court said:

> "It has been settled by previous decisions that all limitations upon the power have not been removed. It must not be exercised in a spirit of prejudice or favoritism. The classification must be based on differences furnishing a reasonable ground for distinction between the several classes."

The latest case in Minnesota, reviewing previous authorities and holding that assessed valuation alone is not a proper basis for classification of counties for purpose of legislation authorizing the acquisition of parks, is

Driscoll vs. Board of Commissioners (1925), 201 N. W. Rep. 945, the Court saying, after a discussion of the cases and citing from *State vs. Brown* the quotation above noted,

> "the critical questions in this case are as to whether the classification is germane to the subject of the law, and is there a relation between the assessed valuation and the public necessity or propriety of recreation grounds? The Legislature is the lawmaking power of the state. If the necessity for this law calls for the exercise of discretion in the classification of particular sub-divisions of the state for the purpose of legislation, we cannot review such discretion and substitute the views of the court as to the propriety of the classification. 'It is only when the classification is so manifestly arbitrary

as to evince a legislative purpose of evading the provisions of the constitution that the courts may and must declare the classification unconstitutional'."

State vs. Westfall, 85 Minn. 437.

"A valid classification should be based upon some natural reason. The counties put in the particular class should require different legislation than those counties omitted therefrom. * * * A law is uniform in its operation if it operates equally upon all the subjects within the class of subjects to which it is applicable; but the Legislature cannot adopt an arbitrary classification even though the law may operate equally upon each subject of each of the classes adopted. * * * The practical limitation is that the classification shall be based upon some natural reason founded in necessity or arising out of differences in the situation and circumstance of the subjects classified making it advisable for different legislation with respect to them. The classification cannot be merely arbitrary. * * * Classification may be very appropriate for legislation on one subject but not for legislation on another subject."

It is to be noted also that taxing acts are to be scrutinized more strictly in this respect than other measures. "This ordinance is not a property taxing measure wherein the rule of uniformity and against discrimination is applied much more strictly than when an ordinance is directed at the licensing of a business which is a proper subject for regulation."

Jefferson Co. vs. City of St. Cloud, 155 Minn. 463, at p. 468.

Applying the rule thus stated, the Minnesota Courts have repeatedly held legislative Acts unconstitutional. Besides the Driscoll case the following are some of the later cases:

Farley vs. City of Duluth, 150 Minn. 374,

holding an exemption of peddlers of farm products from wheelage tax invalid.

Hjelm vs. Patterson, 105 Minn. 256,

holding a classification of counties based on population an im-

proper basis in an Act authorizing the employment of Superintendent of Highways.

State vs. Erickson, 159 Minn. 287,
holding the exemption of minors in a game license law an invalid classification.

State vs. Parr, 109 Minn. 147,
holding an Act taxing peddlers invalid which discriminated between those who sold their own products and those who sold the products of others.

State vs. Fitzgerald, 117 Minn. 192,
holding a taxing Act invalid which discriminated between mortgages over and those under $50.00 in amount.

State vs. Minnesota Farmers Ins. Co., 145 Minn. 231,
holding an Act taxing certain insurance companies invalid which attempted to set up a classification based on salaries paid the officers of such companies.

Coming now to the application of the rule to the facts in the instant case, is the segregation and classification of royalties received for the permission to mine ore, picking out that particular item from all the wide range of things and classes taxable, a fair exhibit of that uniformity which is required under the Constitution? Is the distinction between it and other kindred interests, objects, properties and property rights not taxed such as to suggest at once an essential or even a reasonable difference in substance or kind or situation or theory of taxation which renders the taxing of the one to the exclusion of all the others a fair and legitimate exercise of the taxing power? Is it not quite evident that, notwithstanding the already onerous and unequal burden of taxation upon the mines and mining industries of the State, the Legislature, its cupidity excited by an exaggerated illusion of mysterious wealth, essayed a further adventure on the uncharted seas of taxation in search of buried treasure and, thinking it had located it, proceeded at once to try to possess itself of it by

taxing it in a spirit alike arbitrary, discriminatory, unreasonable and unfair?

Perhaps iron ore may be classified separately for purposes of taxation, although the Minnesota courts have not passed squarely on this question. At any rate the Legislature apparently did not dare to come out openly and increase the ad valorem tax on this species of property then already higher than on any other class; nor did they dare increase the tax on the mining industry under the occupational tax, the only occupational tax in Minnesota. What they did do was to add another and third tax upon the mining properties of the State under the guise of this so-called royalty tax. But these "royalties" do not include returns from all ore or mineral lands, nor all ore or returns from mineral lands. It applies to only those special and peculiar returns resulting from the "permission to mine ore." The thing taxed, whether income or property, is therefore limited to the particular method of realizing on ore lands through this "permission," i. e., through leases or licenses. This is the ultimate basis of the classification. *The incidence of the tax depends solely therefore upon the technical machinery by which the owner seeks to make use of his property and enjoy its fruits.* If he sells his land or his ore outright for cash, there is no tax under this Act either on the gross proceeds or on the profits. If he sells his land or ore on installments of payment, under no reasonable construction of the Act can there be a tax. If he mines the ore himself there is no tax. If as lessee he sells his lease either outright for cash or on installments of payment, there is no tax on the proceeds or the profits. If however he gives a lease or license to another, granting the right to mine the ore, at once upon the adoption of this technical method of handling the property, the tax springs into existence. Nor are these cases of sales, outright or on installments, or of owners mining on their own account mere hypothetical assumptions. Defendant Sargent Land Company has itself disposed of mineral land in that way (R. 61), one sale outright for cash being made

in 1923, and instances of such, as well as of owners themselves operating their own mines, are not uncommon (R. 63). We submit therefore that any tax which is levied in connection with the right to mine ore but which is limited to the "royalties" received from leases or licenses to the exclusion of all other methods of realizing on such right, is based on an entirely too narrow and restricted foundation and is an arbitrary, technical and unreasonable classification and lacking in that fair measure of uniformity which the constitution requires.

But it is said these deposits are "wasting assets" which in time are lost to the State and for that reason furnish a proper basis for the separate classification of leases and licenses. Parenthetically it may be presumed that no one regrets the "wasting" characteristic of mining property more than the owner himself and it would seem a bit unjust to penalize him by an extra burden of taxation for something he cannot help and would gladly remedy if he could. But other methods of handling ore properties may and do work the exhaustion of the ore, as well as leases or licenses

A vendor may require the mine to be operated to make sure of his purchase price. An owner may mine and exhaust more swiftly than a lessee. We can see no essential or reasonable difference between these cases on which to base a separate classification. The learned court below in its memorandum (R. 72) refers to the "identification of separate interests" for the purpose of taxation, as though that in itself furnished sufficient basis for separate classification of those interests. We respectfully urge that the very identification of the "interest" taxed will itself often furnish sufficient proof of the invalidity of a classification, when there is no apparent sound reason why one interest shall be taxed and not the other.

But it is argued that the basis for classification may be founded in "the purpose and policy of taxation"; and that when construed with the Occupational Tax Act before referred to, sufficient legal basis is found for the classification in this Royalty Tax Act. It is

true that the Occupational Tax Act, being a tax on the business of mining, in the computation of the tax permits a deduction for a number of things in the nature of expenses including "royalties" paid. The nature of the two Acts, however, and the incidence of the tax contemplated by them respectively, are so entirely different that it is difficult to base any legal theory on their correlation or to find any constitutional justification for the one in the existence of the other. The occupational tax is measured by what roughly may be called profits. But there may not be any profits although the mine is being rapidly exhausted. Mining expenses even without royalty deduction conceivably in a given case may use up the entire value of the ore mined. Such things have happened. The mine owner operating his own mine under such circumstances, therefore, pays no occupational tax and there is no compensatory royalty tax to the State for he pays no royalty. The theory of close correlation of the two Acts therefore as a basis for classification fails, for the royalty tax which the operating owner is not required to pay is not off-set or compensated for from the standpoint of the State by the denial to such owner of the royalty deduction in the computation of the occupational tax, since he pays no occupational tax. The operating owner therefore in such case pays neither tax. The prima facie discrimination between the owner leasing and the owner operating himself under the Royalty Tax Act is therefore not removed or remedied by a reference to the Occupational Tax Act.

Attention is also called to the deductions allowed in the Occupational Tax Act other than royalties paid, viz.: Amount paid for mining the ore, for removing the over-burden, for sinking of shafts, etc. (Ch. 223, Laws of Minnesota, 1921, Sec. 2). Can it be that the persons performing those services or the profits or income therefrom may be subject to a separate classification for taxation purposes because such expenditures like "royalties" are allowed as a deduction in the Occupational Tax Act? The "purpose and policy of taxation" as a basis for classification has been

carried far afield, but we submit that the relation between these two Acts is too haphazard and too uncertain in results to furnish reasonable support for the separate classification of royalties as a subject of taxation. Each Act is after all absolutely independent of the other. Either may be repealed or amended at any time without affecting the other.

We desire to call the attention of the Court also to the fact that the validity of the Minnesota occupational tax was only qualifiedly sustained by this Court.

Oliver Iron Mining Co. vs. Lord, 262 U. S. 172.

The Court said (p. 180):

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is 'the amount of royalties paid on the ore mined and produced during the year.' This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one and has not been before the supreme court of the State. It apparently requires a construction of the particular provision along with other parts of the Act, and possibly of the State constitutional provision. After that it may be that there would be need for turning to the 14th Amendment. 'Only those whose rights are directly affected can properly question the constitutionality of a State statute and invoke our jurisdiction in respect thereto.'
>
> (Citing cases).
>
> "The record shows that of the many iron mines in the state, all but six are operated under leases, and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore no tax could be imposed in respect of the six mines, based on that year's operations, and it is made plain that the defendants have no purpose to impose one. It cannot be merely assumed that mining has been resumed at those mines, nor that any tax in respect of them for later years is now threatened. The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open."

In other words, while the classification of all those persons engaged in the business of mining, either as owners or lessees, was held valid by the decision in the Oliver case, the question of discrimination whether *all within the class* were "dealt with according to uniform rules" or with that uniformity that the Constitution requires, was left "entirely open." The question is still open therefore whether owners who operate their own mines are subject to the Minnesota occupational tax. Without entering however into an argument of that subject, if owners operating their own mines are not subject to the occupational tax the entire framework of the argument that the Occupational Tax Act and the Royalty Tax Act are supplementary of each other and furnish a basis of constitutionality one to the other, falls to the ground. The operating mine owner is of course not included in the classification attempted to be established by the Royalty Tax Act and is not subject to that tax. It appears also that he may not be subject to the occupational tax and that the State consequently is not compensated directly or indirectly for his omission under the Royalty Tax Act. The two Acts therefore do not dove-tail together. There is a very serious discrimination under Chapter 226 in favor of the operating mine owner and *against* the non-operating mine owner who receives royalties, in that the latter pays a royalty tax and the former does not, a discrimination which is not removed by any computation under the occupation tax for the operating owner pays no occupation tax. The discrimination under Chapter 226 is *against* non-operating mine owners receiving royalty and in favor of operating owners, the reverse of the situation under the occupation tax law discussed in the Oliver Iron Mining Company case: and it is a discrimination against defendant Sargent Land Company in case at bar which plaintiffs are in a position to urge before this Court.

Nor does the Royalty Tax Act in question by any reference to its theory or policy serve to supply a basis retroactively if such a thing were possible, for the constitutionality of the Occu-

pational Tax Act. Its only effect is to compensate the State for the allowance of royalties as a deduction in the computation of the occupational tax, by taxing these same royalties in the hands of a third party, viz., the non-operating mine owners. But as between the operating lessee and the operating owner the situation under the Occupational Tax Act remains exactly the same; the discrimination against the operating owner paying no royalty discussed in the Oliver Iron Mining Company case continues under the Occupational Tax Act just the same as it did prior to the enactment of the Royalty Tax Act. The two Acts still fail to dovetail together.

But conceding for the purpose of the argument that the occupational tax may be held valid as against the objections of owners operating their own mines, it remains entirely uncertain, as before stated, whether they actually pay any such tax based as it is on profits. The Royalty Tax Act and the Occupational Tax Act are therefore at most only *contingently* supplementary to each other and the "theory and purpose of taxation" serves at most only *uncertainly* as the basis of the classification in case at bar. The Royalty Tax Act levies a tax absolutely: the Occupational Tax Act levies a tax only conditionally. The alleged complementary provision in the Occupational Tax Act permitting a deduction for royalties paid in the computation of the tax, shares necessarily the same defect of conditionality and may mean nothing. There is therefore it seems to us a very real discrimination *against* the leasing mine owner who must pay this royalty tax absolutely, and in *favor* of the operating owner who is not subject to this tax and who may not, on the other hand, pay or be required to pay directly or indirectly any other tax whatsoever as an offset or in lieu thereof. We again urge that the classification in case at bar which includes the non-operating mine owner receiving royalty and excludes the owner operating himself, both dealing with the "wasting asset" of an operating mine, is arbitrary, unfair and not founded on any differences in situa-

tion or circumstance making the taxation of the one to the exclusion of the other necessary or reasonable. No tax on the ownership of an operating mine which includes direct royalties but excludes the indirect royalties which an operating owner may appropriate to himself through his mining operations, can possibly be fair or just or based on any inherent differences from any view-point so as to bring the tax within the permissive limits of the constitution in respect of uniformity.

In these matters of uniformity and classification in respect of taxing and other Acts, we are well aware that the legislatures and courts have in recent years gone to great lengths in stretching the limitations set by the constitution.

It is submitted, however, that, if the conclusion of the trial court in this case be correct, then the constitutional provision that "taxes shall be uniform upon the same class of subjects," practically ceases to be mandatory, with the result that the constitution imposes in effect no restriction upon the power of the legislature in respect of taxation, since, by the subterfuge of dividing and sub-dividing recognized classes of taxable property, legislators may, at their election, and to gratify any whim or prejudice or unreasoned conception, create a new and valid class which may be confined in its scope to a single description of taxable property, and, in the last analysis, to the property or business of a single taxpayer.

Thus, by way of illustration, by the judgments of this court and of the Supreme Court of Minnesota, royalties from mining leases are simply *rents*,

> *von Baumbach vs. Sargent Land Co.*, 242 U. S., 503,
> *State vs. Royal Mineral Association*, 132 Minn., 232,

in no respect distinguishable from any other ground rents.

Yet the legislature has here ventured to put into a new and special class, for purposes of taxation, *rents derived from mining leases*, leaving all other "rents," as such, untaxed. Under the theory of the lower court, the legislature, if given time, may pick

out "rents" from oil stations as an additional step in its correlated scheme of covering, in a leisurely and indefinite future, all classes of rents; to be followed, perhaps, by a third enactment taxing rents of farm lands.

Another illustration even closer at hand is seen in the matter of "royalties." The Act in question here has undertaken to make a distinct and definite class of royalties derived under iron mining leases, excluding from similar taxation royalties for permission to mine, take out and remove stone from quarries, or gravel from gravel-beds, or clay suitable for the manufacture of bricks or tiles, and royalties derived from permission to cut and remove hay or standing timber, as well as royalties paid for the use of patent-rights, or the right to publish copyrighted books or music, or to reproduce paintings, drawings and similar copyrighted works. To what "class of subjects" can the constitutional restraint be applicable, if it may be ignored here? If taxing Acts such as the one in question be held valid, where are the confines of uniformity fixed by the constitution, and where are the limitations set by that instrument to individual caprice or class prejudice in the making of tax laws?

POINT III.

THE ACT IS INVALID FOR LACK OF PROPER UNIFORMITY OF TREATMENT AMONG MEMBERS OF THE SAME CLASS.

As stated earlier in this brief, "This Court is not bound by names but will determine the nature of a tax for itself," and that the nature of a tax depends "upon the mission given it by the law under which it is levied."

The learned trial judge must have had this in mind when in the court's memorandum accompanying the decision, it was said:

> "Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax" (R. 73).

In other words, it is *a property tax* on the taxpayer's interest in mineral land.

The granting words in the Sargent Company mining lease (R. 12), are "do hereby lease, demise," and said lands are "leased and demised....for the purpose of boring, digging, exploring for, mining, taking out and removing all the merchantable iron ore." The term of the lease is fifty years with exclusive possession of the premises, and with full warranty of title (R. 13).

The word "permission" as used in Chapter 226 would therefore appear to be a grant of the right of possession and profits of a parcel of land for the enjoyment of which royalty is paid.

The right to possess a parcel of land and to enjoy the profit thereof is of the very essence of ownership. They may be said to be the paramount interest in land. "What is property but the profit thereof." And the profit must rest on the use of the land from which it springs.

Hence the tax, upon this assumption, is in truth and in fact

levied on an interest in land, and the six per cent rate, and the amount of money or royalty received, are merely the yardsticks to measure the amount of the tax.

Real property for the purpose of taxation is defined as follows:

> "Real property, for the purpose of taxation, shall be construed to include the land itself, and all buildings, structures, and improvements or other fixtures of whatever kind thereon and all rights and privileges thereto belonging or in any way appertaining, and all mines, minerals, quarries, fossils, and trees on or under the same."
>
> Sec. 1972, Gen. Stat. Minn. 1913 (R. 45).

And it is declared that,

> "In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot."
>
> Sec. 1988, Gen. Stat. Minn. 1913, as amended by Chap. 140, Laws 1923: last part of paragraph, "Class I" (R. 46).

The true and full value of the right to possess and to enjoy a particular parcel of land, is, along with its mineral content, the land itself, and every other interest, for the purposes of establishing a basis upon which the ad valorem tax may be computed, ascertained *en bloc*, by orderly statutory proceedings including appraisal by assessors, hearings and equalization. This true and full value having been ascertained the provisions of said Section 1988, General Statutes, Minn., 1913, are applied to determine the assessable value of property. These provisions are in substance that iron ore shall be assessed at 50 per cent of its true and full value; city and village real estate at 40 per cent of its true and full value, and farm lands at 33 1/3 per cent of their true and full value.

Class I property which is assessed at 50 per cent of the true and full value, is, by said Section 1988, declared to be "Iron ore whether mined or unmined."

Under the system of taxation put into operation by the Minnesota Tax Commission, "Class I" mining properties are divided into two groups—"operating mines and reserves." These groups are sub-divided into six classes of operating mines and six classes of reserves and a different valuation applied to each class.

The six sub-divisions are as follows:

Class 1. Properties operated by open pit methods where mining cost is comparatively inexpensive and the ore high grade.

Class 2. Properties operated by open pit methods where mining cost is comparativley inexpensive and the ore of a lower grade.

Class 3. Properties operated by open pit or mixed methods, where mining is somewhat more difficult and mining costs greater than in the case of Classes 1 and 2, and the ore of mixed grade.

Class 4. Properties operated by underground methods, where the expense of mining is comparatively low for that kind of mining and the ore of high grade.

Class 5. Properties operated by underground methods, of distinctly second grade and determined by a higher cost of mining and lower grade of ore than in the case of Class 4.

Class 6. Properties of an inferior character to those covered in the preceding classes, operated by underground methods of mining, under high mining cost and a mixed grade of ore.

Eighth Biennial Report, Minnesota Tax Commission (1922), p. 40.

The Minnesota Tax Commission has also established as a basis for ascertaining both the true and full value and the value for assessing purposes of these several sub-classes or groups, the following rates per ton to be used as a multiplier of the tonnages of ore ascertained to be in the land subject to assessment:

Class	Rates per ton for establishing full true value.		Rates per ton for establishing the full assessed value being fifty per cent of the true value.	
	Mine Cents	Reserve Cents	Mine Cents	Reserve Cents
1	80.22	51.04	40.11	25.52
2	72.88	43.68	36.44	21.84
3	65.72	36.54	32.86	18.27
4	55.86	26.66	27.93	13.33
5	46.20	24.36	23.10	12.18
6	24.02	19.54	17.01	9.77

(Said report page 41.)

With these facts and figures in mind, let it be assumed that there are two forty acre tracts of iron ore land lying in the same taxing district; that each tract has an ascertained mineral content of 1,000,000 tons; that the assessed valuation of each tract is the same; that the tax rate for all State, County, Municipal, School and all other purposes is seventy mills; that each is classified as a sub-"Class 1" operating property; that each is under lease; that the annual minimum tonnage requirement is 100,000 tons in each; but that the royalty in one case is 25c and in the other is $1.00 per ton of ore.

The taxes which the respective owners of these properties would have to pay would be as follows:

Case No. 1.

Ad valorem tax: 1,000,000 tons at 40.11 cents makes a gross true and full assessed value of $401,100.00, which, at 70 mills tax rate, equals	$28,077.00	
Royalty tax, on annual minimum of 100,000 tons at 25 cents, or $25,000, at 6%, equals	1,500.00	$29,577.00

Case No. 2.

Ad valorem tax: as above	$28,077.00	
Royalty tax, on annual minimum of 100,000 tons at $1.00, or $100,000, at 6%, equals	6,000.00	$34,077.00

The gross tax in case No. 1 is 7.38 mills on the assessed valuation.

The gross tax in case No. 2 is 8.5 mills on the same valuation.

And the owner in case No. 2 pays an annual tax of $4,500.00 more than his neighbor on property of the same value.

Examples of this kind could be multiplied almost without limit as there are six sub-classes of the operating mines and six of the reserve body mines, and innumerable leases, with varying annual minimums and royalty rates, thus giving rise in the final analysis to gross inequalities, and arbitrary differences in treatment, in the application of Chapter 226, among members of the same class of subjects. The members of each class or sub-class are in exactly the same situation as respects the taxation of their real property.

An Act which purported to impose a tax of two per cent. in the nature of an excise tax or license on freight lines and equipment operated in the State of Minnesota was held to be a property tax and void as not being uniform with the rate imposed on other property similarly taxed. The Court saying:

> "Where the method adopted is a tax upon property based upon valuation, the rate imposed must be uniform, and apply alike to all who are thus taxed. The property of one citizen may not be taxed at a greater rate than that of another. And, however difficult it may be to obtain equalty in other respects, a uniform rate may and must be imposed in this class of taxation."
>
> *State vs. Canda Cattle Car Co.*, 85 Minn. 461.

> "Concededly the gross-earnings tax is based upon the right to tax the property out of which the earnings are derived."
>
> *State vs. Cudahy Packing Co.*, 129 Minn. 33.
>
> *State vs. United States Express Co.*, 114 Minn. 346.

The valuation in determining the basis upon which the gross earnings tax rests, is made in a different manner and upon a different basis than the ordinary valuation of land is made for the purpose of fixing the ad valorem tax. But the end reached is

the same in both cases and the rate must be uniform as to the class of subjects. In the case at bar the mine owner's property is valued and assessed pursuant to law under the rules and regulations of the Minnesota Tax Commission, and a uniform tax, as to class, levied. It does not lie in the power of the Legislature (if this purported royalty tax is in fact a tax on land) arbitrarily to throw that tax out of balance and harmony by attempting to impose an additional tax which is unequal in rate and which gives birth to gross irregularities in uniformity of application.

And right here let memory refresh itself with the words of Chief Justice White:

> "And no change in the situation here would arise, even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of taxing power, the Act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."
>
> *Brushaber vs. Union Pac. R. R. Co.,* 240 U. S., 1, 24-25.

And, further, Chapter 226 imposes "direct double taxation."

> "Such a course would result in double taxation, which is forbidden by the constitution and is not authorized by statute."
>
> *State vs. Farmers & Mechanics Savings Bank,* 114 Minn. 95 (p. 113).

It must follow, if Chapter 226 imposes a tax on real property in addition to the *ad valorem* tax, that the chapter is unconstitutional and void, as it is arbitrary, produces "gross and patent inequality," imposes direct double taxation, and lacks uniformity of application among members of the same class.

POINT IV.

THE ACT DOES NOT AND CANNOT APPLY IN ANY EVENT TO ROYALTIES FOR ORE MINED PRIOR TO JANUARY 1, 1923; NOR TO ROYALTIES DUE PRIOR TO THAT DATE THOUGH PAID AFTERWARD.

The Act in question was passed April 11, 1923, and by its terms levied a tax "upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter."

It appears in evidence in this case (R. 61) that a portion of the moneys received by defendant Sargent Land Company in 1923 and threatened to be taxed under this Act represents royalties upon ore actually mined and removed by the lessee during the calendar year 1922.

In the event the Act be held constitutional from the standpoint of uniformity and classification, there is the further question involved on this appeal whether and how far it applies or can apply to such royalties received during the year 1923 for ore mined *prior to that year.* The case being properly in this Court "all questions presented by the record whether involving Federal or State law, must be considered."

Atlantic Coast Line Ry. vs. Daughton, 262 U. S. 413.

The lower Court declined to pass on this question, stating (R. 73) "the question of what royalty receipts shall be included in the computation of the tax for 1923 is not decided. It is assumed that in the administration of the law, the Act in question will be so construed as not to offend against any constitutional provision." The question is of considerable importance not only to plaintiffs in the instant case, but also to many other contestants whose cases are pending awaiting the decision of this court in this case.

There is no doubt that an Act intended to levy a tax of an

original nature retroactively for a past period of time is unconstitutional and void. Certain States have express prohibitions in their constitutions against retroactive legislation and such taxing acts have frequently run foul of this prohibition. "The Act saddles upon him a liability as to a past transaction in regard to which he was free from liability and which could not lawfully be imposed upon him at time of the passage of the Act. To this extent it is certainly retroactive within the letter and meaning of the constitution and could not therefore be constitutionally passed."

Holliday vs. City of Atlanta, 96 Ga. 377.
New England Mortgage Co. vs. Board of Revenue, 81 Ala. 110.
State vs. Galveston Ry., 100 Tex. 153.

But even in States in which there are no express constitutional prohibitions against retroactive legislation, other than *ex post facto*, such tax legislation is held to be in violation of the "due process of law" clause of both the State and Federal Constitutions.

"The exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, in violation of the Federal Constitution."

Frick vs. Commonwealth of Penn., U. S. Sup. Court, 17 Adv. Op. 692. Oct. term, 1924.
Cooley on Taxation (4th Ed.), Sec. 520.
City of Grand Rapids vs. Lake Shore Ry., 130 Mich. 238.
Weber vs. City of Detroit, 158 Mich. 149.
People vs. Union Bag Co., 118 N. Y. Sup. 456.

In a case involving the attempted taxation by the State of Kentucky of certain bank shares for one or more previous years, the Federal Court, in holding the Act unconstitutional, said:

"The court will not attempt to decide that there may not in extreme cases be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case and one which would come extremely near to taking property for public use without compensation and might be most dangerous and oppressive as well as

destructive of many other established principles of the law of taxation. If the power to do this exist at all, there is no limit to it."

First National Bank vs. City of Covington, 103 Fed. 523.

The violation of "due process of law" does not of course take place when the Act is remedial in nature or is based on some previous obligation to pay the tax. It was this distinction which sustained an Act taxing lands previously escaping taxation, though subject to the tax, in the Minnesota case of

County of Redwood vs. Winona & St. Peter Ry., 40 Minn. 516, affirmed on appeal by this Court, 159 U. S. 526;

and taxing lands under-assessed in previous years.

Weyerhaeuser vs. State of Minnesota, 68 Minn. 353, affirmed on appeal by this Court, 176 U. S. 550.

In both these cases involving taxes assessed for prior years, the general rule was apparently conceded to be that the legislature in an Act levying an original tax does not have the right under the constitution to extend the tax backwards to cover a prior period of time. If the Act in question in the instant case attempted to levy a tax on royalties received in 1900, or in 1910, or in 1920, or even in 1922, it would be clearly invalid as to those years. Does the fact that the Act starts with only those royalties received in 1923 remove the unconstitutionality in this respect? If it be an excise tax, it would seem clear that the tax cannot be laid upon anything that was done, or be measured by anything that was done, *prior to the passage of the Act,* much less by anything that was done in 1922.

State of Texas vs. Galveston & Harrisburg Ry., 100 Tex. 153.

An Act passed July 5, 1905, imposing a tax on Railway Companies equal to one per cent of their gross annual receipts was held to be an excise tax measured by such gross receipts, and so much of it invalid as attempted to include in the computation of the tax the gross receipts of the Companies prior to date of passage of

Act from January 1 to July 5, 1905, the Court saying (p. 175) "if the Act in question be construed to embrace the whole of the year 1905 and entitles the State to collect the full annual tax for that year, it would confer upon the State a right against the railroads which did not exist before the law took effect, and it would impose upon each railroad a burden to which it was not liable before the law became effective."

If the tax in question be construed as an income tax, it may perhaps be conceded to tax all royalties received in 1923, otherwise taxable, including those received prior to the passage of the Act, the calendar year being considered but a single unit of time.

Brushaber vs. Union Pacific Ry., 240 U. S. 1.

But as to those royalties which, though received in 1923, were in payment of ore actually mined and removed in 1922, or previous years, they are not properly or fairly to be construed as income of the year 1923. The transactions which they represent and out of which they sprang took place in 1922 and are *closed transactions* of that year. Under the Federal Income Act they would ordinarily be treated as income of the year 1922 although paid in 1923.

If, however, the Act in question be a property tax on money, land or an interest in land—measured by these royalties, it would seem clear that this *measure* cannot be extended indefinitely into the past by the legislature. The tax is of and for the year 1923. The measure or yardstick must be of the same year and bear a reasonable relation to the thing measured. For that reason we submit that royalties received in 1923 for ore mined in 1900 or 1910 or 1920, or royalties received in 1923 for ore mined in any year previous to 1923, are beyond the constitutional power of the legislature to tax in this Act of 1923; because, in effect, whether the tax be on the royalties direct or whether the royalties only measure the tax, the thing taxed is created or controlled by conditions in existence and effective before the tax was laid and

to which the tax cannot now *be made retroactive*. Royalties as a result of ore mined previous to 1923 do not have any reasonable relation to a determination of the values of anything in 1923. Suppose a mine be exhausted by the mining operations of the year 1922, but royalties therefor not received until 1923. Is it reasonable to believe that the State has the power to tax that mine or any interest in that mine, in any form or under any name, as of its status in 1923 measured by the royalty receipts of that year, when those receipts really reflect the 1922 status and measure the 1922 value of the property, a property which in 1923 is become worthless? And if the State can so tax, can it tax a mine exhausted in 1910 or 1920, the royalties from which however were not received until 1923? As was said by the Court in the case of *First National Bank vs. City of Covington* (*supra*), "if the power to do this exist at all, there is no limit."

But we need not pursue this constitutional question further, for a proper construction of the Act we believe leads to the same practical result. This evidently was the opinion of the court below. It is elementary that statutes are not to be given a retroactive interpretation unless clearly required by the language of the Act itself.

State vs. Probate Court, 142 Minn., 283, at p. 287.

> "It may be laid down as a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only, unless a legislative intent to the contrary is expressed or necessarily to be implied from the language used or the particular circumstances, especially where to construe the act as retrospective in its operation would render it obnoxious to some constitutional provision."
>
> *Stein vs. Hanson*, 99 Minn., 387, at p. 389.

This Court in the recent case of

Lewellyn vs. Frick, (Oct. Term 1924), 15 U. S. Sup. Court. Adv. Opinions 585,

in construing that provision of the so-called estates tax of the Revenue Act of 1919, which purports to tax the proceeds of life

insurance payable to a third party beneficiary, held that the Act did not apply to policies the right to the proceeds of which had vested in such beneficiaries before the passage of the statute, although not received by them until after its passage. In this case the Court used the following language:

> "We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable, and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind. *Panama R. Co. vs. Johnson*, 264 U. S. 375. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'That laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways."

The rule has also been very well expressed in

2 Cooley Taxation, (4th ed.) Sec. 520.

"There is commonly a presumption that any new tax law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence. 'New burdens,' it is very justly said, 'ought always to be prospective'."

Again in the recent case of

Danser Co. vs. Gulf R. R. Co., Sup. Ct. 17 Adv. Op. 720,

this court said "all statutes are to be considered prospective unless the language is expressed to the contrary or there is a necessary implication to that effect. To give it that effect (i. e., retroactive application) would be to deprive defendant of its prop-

erty without due process of law in contravention of the 5th Amendment."

In the very recent case of

State vs. Crete Mining Co., 204 N. W. Rep. 932, 934 (July, 1925),

the Supreme Court of Minnesota held that the Minnesota Occupation Tax Act, discussed in this brief, which went into effect April 11, 1921, was not to be construed to levy an excise tax retroactively upon the business of mining which was carried on between January 1, 1921, and April 10, 1921, but which ceased after the last named date. The court did not enter into a discussion of the constitutional questions involved, but rested its decision upon a proper construction of the Act, saying:

> "There is no satisfactory evidence that the legislature intended to tax those whose mining operations were completed prior to April 11, 1921, and who did not re-engage in the business before the calendar year ended. There is no unavoidable implication of such a purpose. Full effect can be given to Chapter 223 without placing such a construction upon it. In spite of the earnestness and ability of the argument in favor of the construction advocated by the Attorney General, we are clearly of the opinion that it cannot be adopted without imputing to the legislature an intention to depart from the established policy of restricting the operation of a tax law to the future and of making the law speak prospectively and not retrospectively."

Looking to the heart of the Act in question, while the tax is laid nominally on royalties, what the Legislature intended in the last analysis to reach, in some form, was the iron ore and especially the mining of ore. "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six per cent." (Sec. 1). Whatever the tax may be, the measure of it or the extent of it was to be determined by this mining and removal of the ore or by the permission to mine which was accounted the same thing. And this fact of the mining and removal of ore mani-

festly determined also in the minds of the legislators the limits in time when the tax was to be operative.

It is therefore the real test by which to determine when the tax was to commence and when it was to end and what royalties it was to affect and what not. Applying this test it seems clear that the Act was not intended to tax royalties received for the mining and removal of ore which had already taken place prior to the calendar year 1923. The Act makes the calendar year the unit of time, and the year 1923 is the starting point. The Act speaks from that year and looks to the future, not the past. It was only therefore with the reference to the mining and removal of ore which was to take place *from that time* on, that the Legislature intended by this Act to levy, in so far as they might, this special and additional tax on royalties.

It appears in evidence also that some of the royalties threatened to be taxed in this case are advance royalties which were due in October, 1922, but not in fact paid until after January 1, 1923 (R. 61). These advance royalties are payments in advance for ore which may thereafter be mined and removed by the lessee at his option at any time. The ore was not mined prior to January 1, 1923, so far as the record shows. The Act purports to cover these cases of advance royalties under the term "permission," levying the tax whether any ore be actually mined or not: the theory being that the ore thus paid for would ultimately be mined. There would seem to be no sound distinction so far as a discussion of this tax is concerned, between ore actually mined before the Act took effect and ore fully paid for prior to that time but not mined it may be until thereafter. The lessee in the case of advance royalties becomes the equitable owner of the ore. He may remove it at any time independently of the lessor. If these advance royalties were in fact paid prior to January 1, 1923, they could not and would not be reached by the tax either under the spirit or letter of the Act; even though the ore represented by these advance royalties were not removed until after that date.

The fact then that the ore in this case may not actually be mined until after the passage of the Act is not decisive. Does the fact that the advance royalty payment which was due October 25, 1922, was not in fact paid until after the Act took effect, bring the payment within the intent and spirit of the Act? We think not. It seems to us here again that, reasonably construed with reference to the time the Act was intended to take effect and with reference to the objects and transactions intended to be covered by the Act, the tax was not intended to be laid upon an obligation such as this, past due at the time the Act took effect.

POINT V.

EVEN IF THE ACT BE VALID, MONEYS RECEIVED UNDER THE SALE-CONTRACT (EXHIBIT 2) ARE NOT TAXABLE UNDER THE TERMS OF THE ACT.

There is one question which, as respects the suits pending in this court touching the validity of Chapter 226, arises only in the instant case, under the contention of the State of Minnesota that the installment payments under the agreement, Exhibit 2, are "royalties" within the definition of Section 2 of said Chapter.

The appellants contend that, neither under the common understanding of the term, nor under its statutory definition, can the purchase price of property be considered as "royalty."

The decision of the learned trial judge affords no aid in the determination of this question. After stating that the memorandum filed in the case of *Royal Mineral Association, et al. vs. Samuel Lord, et al.* (decided by him at the same time) is adopted and made a part of this case, he adds (R. 74):

> "In addition, while technically the contract of the Sargent Land Company, on its face, may be one of sale, and amounts payable from time to time thereunder may be deferred installments of money called the purchase price, yet, having in mind the purpose and object of Chapter 226, Laws of Minnesota, 1923, *there is in substance no real distinction which can be drawn between the contract and the ordinary so-called mining lease. Both accomplish the same purpose in much the same way, and it would not do to hold that the tax under the law applies in one case and does not apply in the other case.*" (Italics are ours.)

It is respectfully suggested that this conclusion coincides neither with reason nor with authority.

The receipts of the Sargent Land Company sought to be taxed by the State of Minnesota under the provisions of Chapter 226 are of two kinds:

(1) Royalty receipts derived under contracts in the form

of mining leases similar to Exhibit 1 attached to the complaint in this action (R. 61); and

(2) Moneys received from the vendee under the contract Exhibit 2 attached to the complaint (R. 61).

If chapter 226 be held to be constitutional and valid, the appellants, as stockholders of the Sargent Company, must concede the liability of the corporation to pay the tax imposed thereunder upon its receipts of the first kind; *but they deny the power of the State to exact, under said chapter, a tax upon the payments of purchase price of ore sold, received by the company from the vendee under the contract Exhibit 2. Such payments are not "royalty," and do not fall within the embrace of the act.*

The enforced collection of a tax upon such receipts would be unconstitutional, both as an unlawful taking of private property for public use without compensation in violation of the 5th amendment, and as offending the due process provision of the 14th amendment, of the Federal Constitution.

Frick vs. Commonwealth, U. S. Sup. Ct. Decided June 1, 1925, 17 Advanced Opinions, 692-694.

The question then arises, whether, *because the purchase price of ore in place is payable in installments*, its character is changed and it becomes, *ipso facto*, "royalty"?

The position of appellants is sustained by the language of Sections 1 and 2 of Chapter 226 (R. 42-3). These sections read:

> "Section 1: There shall be levied and collected upon all royalty received during the year ended December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six (6) per cent.
>
> "Sec. 2: For all purposes of this Act, the word 'royalty' shall be construed to mean the amount of money, or value of property, received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out and remove ore therefrom."

Hence, unless the money (or value of property) sought to be made the subject of the tax be received "for permission to explore, mine take out and remove ore" from land in the State of Minnesota, it does not fall within the purview of the Act.

The language of the definition is so unequivocal as respects the single subject of its application that it requires no interpretation, and permits no construction.

If the purpose and object of the Legislature in the enactment of Chapter 226 were, as assumed by the trial judge, to reach all moneys derived from the ownership of iron ore or of any interest therein, in whatever form received (which assumption there is nothing in the Act itself to support), it is apparent from its language, which is clear and unambiguous, that such purpose and object were not accomplished. The multiple scheme of taxation existing in the minds of successive legislatures, recited in the main opinion of the Court (R. 70, 72), finds no foundation in the record; but, if it did, it would present a conclusive argument against the expressed view of the Court that "it would not do to hold that the tax under the law applies in one case (mining leases) and does not apply in the other case (Exhibit 2)." Until the Legislature in specific terms imposes a tax upon any class of property or of property rights, none can be levied upon or enforced against the same. Chapter 223 of the Laws of 1921 imposed a tax upon the occupation of mining, but it was not until the enactment of Chapter 226 of the Laws of 1923 that "royalties" could be reached, and until then that particular "interest in mineral lands" escaped the grasp of the tax gatherer. It would require a far slighter stretch of interpretative logic to embrace "royalties" under Chapter 223, "An Act providing for the imposition of a tax upon persons * * engaged in the business of mining or producing iron ore," than is required to subject purchase price of ore sold to the burden of an Act taxing royalties,—especially in view of the emphatic distinction which the Minnesota Court has made between mining leases and sales of ore,

between royalties (or rents) and purchase price of ores. If, in its wisdom, and in the further endeavor to carry out the imaginary scheme of taxation referred to, some future Legislature shall see fit to enact a law taxing proceeds of sales of minerals or mineral lands, it may result that vendors under contracts of the nature of Exhibit 2 will be subject to the additional tax burden; but until such time, such installments of purchase price will be free from a discriminatory tax which is not imposed upon other moneys and credits.

If payments of purchase price of the ore sold by the Sargent Land Company under and by virtue of the contract Exhibit 2 be not a consideration for "*permission* to explore, mine, take out and remove ore" from the lands therein described, the law is inoperative in respect of such payments quite as much as it would be in respect of payments of interest or principal upon bonds or other securities, or purchase price received by the corporation from the sale of personal property or non-mineral-bearing lands.

WHAT IS "ROYALTY"?

The word "royalty" is of ancient origin, and has always had a well-defined and distinctly limited meaning, both historically and by common usage.

Historically, under the old common law, as one branch of the royal revenue, mines of gold or silver, and mines of base metals containing gold or silver, were called "royal mines," from the King's prerogative of coinage, in order to supply him with materials therefor,—and the products of such mines were "royalties." Later, this was modified by statute as respects base metal mines, the King being entitled to the ore only upon payment therefor, at a price fixed by the law.

1 *Blackstone's Comm.*, 294.

So, too, with coal and other valuable minerals found on crown lands. They might be mined and removed in consideration of the payment of a stated "royalty" per ton, or other measure.

In *Webster's New International Dictionary,* we find the following definitions of "royalty":

"(a) Any of the royal rights constituting the *regalia,* including various rights in land, such as the right to all gold and silver mines, called 'royal mines'; hence, a percentage paid to the crown of gold or silver taken from mines, or a tax exacted in lieu of such share.

(b) A share of the product or profit (as of a mine, forest, etc.) reserved by *the owner* for permitting another to use the property.

"(c) A duty or compensation paid to *the owner* of a patent, or a copyright, for the use of it . . . ; also

"(d) A percentage, as an output, paid to *the owner* of an article, especially a machine, by one who hires the use of it."

With the exception of the definition (a) above quoted, these various classes of royalty are recognized and are in common employment in this country.

In the *New Standard Dictionary,* the following definitions are given:

"A share of proceeds paid to *a proprietor* by those who are allowed to develop or use property, or operate under some right *belonging to him, as the owner* of mining lands for ore taken out, to *the owner* of a copyright for books published and sold, or to *the owner* of a patent for articles manufactured and disposed of thereunder; a use originating in the meaning defined below.

"A tax or seigniorage paid to the crown, as on the produce of royal mines or lands for the right of working them, or on gold and silver coinage."

So, in the *New Oxford English Dictionary,* definitions as follows occur:

"A royal prerogative or right, especially in respect of jurisdiction granted by *a sovereign* to an individual or corporation.

"pl. In later use chiefly denoting rights over minerals.

"A payment made to *the landowner* by *the lessee* of a mine in return for the privilege of working it.

"A sum paid to *the proprietor* of a patented invention for the use of it.

"A payment made to an author, editor or composer for each copy of a book, piece of music, etc., sold by the publisher, or for the representation of a play."

The Century Dictionary speaks of "royalty" as

"(1) A royal due or perquisite; especially a seigniorage due to a King from a manor of which he is lord;

"(2) A tax paid to the crown, or to a superior representing the crown, as on the produce of a royal mine.

"(3) A compensation paid to *one who holds a patent* for the use of the patent, or for the right to act under it, generally at a certain rate for each article manufactured.

"(4) A proportional payment made on sales, as to an author or inventor for each copy of a work, or for each article sold."

In

Indian Natural Gas & Oil Co. vs. Stewart, 44 Ind. App., 554; 90 N. E., 384,

the action was brought by a lessor of mining property to recover annual rents or royalties agreed to be paid by the lessee. There was a clause in the lease reading as follows:

"(7) Second party may at any time re-convey this grant, and thereupon this instrument shall be null and void. A well shall be drilled within two years from this date, or the royalty paid to first party."

Two years had elapsed after the execution of the lease, and no well had been put down; the contract was still in force and the lessee had failed to pay the annual royalty specified in the lease. The court held that the plaintiff was entitled to recover and in the course of its opinion used this defining language:

"The word 'royalty,' found in the seventh clause, generally has reference to a share of the product or profit reserved by *the owner* for permitting another to use the property."

Permission to use, hire, explore, remove, dispose of, transform or destroy property of any sort can only be given to a stranger to the title *by the owner* of the property or right affected. One who

has no property interest in land or chattels can give no valuable or valid "permission" respecting the same.

On the other hand, the owner can so employ, or act toward his property, *without permission from any one* and without restriction, save as he may be limited in his action by police regulations of the State.

The controlling word in the definition of royalty as found in Chapter 226 is the word "permission," for *royalty* is merely the consideration for *permission* to exercise or to enjoy some power or privilege respecting the property of another, or a desired right controlled by another. Such power or privilege is not a natural or legal right, else it could be exercised or enjoyed without permission. It is dependent upon the consent of *the owner* of the property or desired right, who himself needs no permission respecting what he does or refrains from doing with his own.

The concurrence of all of the authorities above quoted in the statement that royalty is a payment to *the owner* (or proprietor) for permission to use or appropriate a given property or right, is manifestly not a mere coincidence. Ownership *by the payee* of the right or privilege for which royalty is paid is an essential element in the definition.

The title of Chapter 226 reveals distinctly a similar legislative understanding of the nature of iron ore royalties (to-wit, that they are moneys paid to *the owner* of iron properties or mining rights by lessees thereof), and indicates the legislative purpose in the enactment of the Act to be the taxation of such receipts only. The Act is entitled, "An Act providing for the levy and collection of a tax on royalty *received by the owner* of any right, title or interest in land situate in this State, for permission to explore, mine, take out and remove ore from the same."

In like manner, the last sentence of Section 5 of the Act reflects the same distinct understanding. The sentence referred to reads as follows:

"A person *sub*-letting land for the use of which he received (receives) royalty shall be required to pay taxes only on the difference between the amount of royalty paid *by him* and the amount received."

Carelessly as this sentence is worded, its meaning is sufficiently obvious, namely: That a lessee or licensee possessing the right to explore, mine, take out and remove ore from lands in Minnesota, who sub-lets his right to another in consideration of an increased royalty, shall be required to pay taxes only on the difference between the amount of royalty paid by him (as such lessee or licensee) to the fee owner and the amount received by him from his sub-lessee.

The clause impliedly, if not directly, assumes and recognizes that "royalty" represents money paid *to the owner* of the mineral property, or (in the case of a sub-letting) of a mining right therein derived from such owner.

Hence, if the vendee under Exhibit 2 be the owner of the ore, his mining and removing of the ore is done by virtue of his ownership, and not by reason of permission from the former owner who has parted with his proprietary interest therein; and it follows that the payments made by the vendee under Exhibit 2 are not "royalties" within the definition of Chapter 226, because (a) they are not paid to *the owner* of the ore for permission from him to mine the same; and (b) they are, by the clear terms of the contract, installments of the purchase price of the ore,—the consideration for the transfer thereof to the vendee, who can thereupon exercise, without seeking permission from anyone, such powers and rights of dominion as inhere in proprietorship, including the right to do nothing at all, and, if he so elect, to pass the title on to another.

Thus, in

Girard Trust Company vs. McCaughn, 3 Fed. (2d), 618.

"What was the 'interest' which (before the grant) the grantor had in the real estate premises? Her 'interest' or

estate was in fee simple, the full and absolute ownership. This gave her several rights of property. One was to possess and enjoy the physical premises for life or as long as she chose; another was to part with her ownership for a consideration if she so chose; another was to pledge it for a loan, and still another was to transmit it to her heirs or to devise it to whom she chose. All of these rights, except only the first, she granted absolutely and irrevocably to another. The grant was not *in futuro*, but *in presenti*. What she granted was real estate. This is not a thing, but a right, interest, or estate in land, and what has become so far incorporated with land as to be a part of it. The possession and enjoyment of this estate or interest was immediate, and not postponed to the time of death of the grantor, because admittedly the estate conveyed was a vested interest.

"These distinctions are so well known, and indeed so obvious, that they must have been in the legislative mind. The thought at once obtrudes that if Congress had meant that for which the defendant contends, it could have been and would have been unmistakably expressed."

Our contention is again illustrated by the case of

Light & Thorium Co. vs. Alexander, 80 S. C., 10.

This was an action for specific performance of a contract whereby the defendant "agrees to sell to said English, by good and sufficient deed, with the usual covenants of warranty, free of all incumbrances, the mineral and mining rights of" described lands. The contract also provided:

"The said English agrees to buy the said mineral and mining rights, and to pay for the same upon the delivery of said deed. *Pending the execution and delivery of the said deed to* said English, said Alexander agrees *to permit* said English to take and remove from said lands such monazite sand as he may mine thereon."

Presumably, although it is not stated, the plaintiff acquired the rights of English under said agreement. The opinion states:

"The first question that will be considered is whether the agreement conferred upon the plaintiff a mere license subject to be revoked at any time by the defendant. Alexander agreed to *sell* to English, by good and sufficient *deed*, with the usual covenants of *warranty*, free of all *encumbrances*,

the *mineral* and *mining rights* of his land. English agreed to *buy* and *pay* for those rights upon the delivery of the *deed*. It will be observed that the language in the first and second clauses is quite different from that in the third clause in which Alexander agreed, *pending* the delivery of the deed, to *permit* English to remove the monazite sand from the land." (The italics are the Court's).

The opinion continues:

"The words which we have italicized are inconsistent with a revocable license and show that, if the executory agreement is carried into effect by the execution of a deed, it will confer upon the plaintiff an interest in the land itself which could be assigned."

The distinction which the Court recognized and emphasized between the situation of the parties prior to and after the actual delivery of the deed contemplated by the contract, is well shown. *While the defendant retained title to the minerals, he could grant permission to plaintiff to remove sand; but, as soon as the title passed to plaintiff, the latter's right of removal existed by virtue of his ownership, and no longer by reason of the permit.*

As a consequence, we are not concerned at the moment with the constitutionality of the act as respects the legislative power to impose a tax on the particular kind of royalties described in Chapter 226. The immediate question is: *Can that tax, if valid, be applied to and enforced against the purchase price of ore sold?*

It is not asserted by the State that royalties paid for (a) the use of a patent; or (b) for the publication and sale of copyrighted books, maps, pictures, music, etc.; or (c) those derived from the use of machines and mechanical devices (such as telephones, typesetting machines, etc.); or (d) even royalties paid for permission to cut and remove timber, or to excavate and remove stone from quarries, or gravel from gravel-beds, are subject to the "royalty tax" attempted to be created by Chapter 226. This fact emphasizes the pronounced limitation upon the scope of that Act, and the clear intention of the legislature to restrict its application

solely to moneys received by the owner of ore lands in the State of Minnesota, for the grant of "permission to explore, mine, take out and remove ore" from such lands.

The case is one, therefore, falling within the familiar principle applied by this court in

Gould vs. Gould, 245 U. S., 151, 153,

to the effect that a tax law cannot be extended beyond the clear import of the language used, or be enlarged so as to embrace matters not specifically pointed out; and that, in case of doubt, it must be construed most strongly against the government and in favor of the taxpayer.

We are brought, then, to a consideration of the terms of Exhibit 2, and a determination of the actual character of that instrument; for, if it be not a permit "to explore, mine, take out and remove ore," the moneys paid and received thereunder are unaffected by the provisions of Chapter 226.

THE CONTRACT FOR SALE OF ORE.

(Exhibit 2, Record 23.)

As has been stated, *it is the contention of appellants that, even if Chapter 226 be held valid and operative upon royalties derived under mining leases, payments received by Sargent Land Company under Exhibit 2, being the purchase price of ore sold under an express contract of sale, are not subject to the tax initiated by said Act.*

In sub-division 7 of the complaint (R. 3), it is alleged that the Sargent Land Company has *sold* to a certain vendee, the iron ore in, under or upon a portion of its lands, and that the moneys paid to the corporation under the terms of the agreement of sale (Exhibit 2, R. 23) are not, and were not at any time, *royalties* received by the corporation for permission to explore, mine, take out and remove ore from said land, but were and are the agreed

purchase price, or installments thereof, paid by the vendee in said sale-agreement for the ore therein described.

The execution of the agreement of sale; that Exhibit 2 is a true copy thereof, and that substantial amounts of money have been received by the Sargent Land Company by way of payments made to it *"under the provisions of said agreement,"* are stipulated as facts in the case. (See paragraph 11 of Stipulated Facts, R. 61). No other proof was offered or received upon the trial of the case with reference to these facts.

"The provisions of said agreement" are as direct and conclusive as language can express that such payments are "installments of purchase price" and not royalties, or rents. Unless the Court ignores the agreement as to this fact, the decree appealed from must be modified.

Moreover, examination of Exhibit 2 discloses:

(a) That it is an agreement containing all of the elements of a sale and transfer of the ore, with the usual covenants of warranty of good title and quiet enjoyment;

(b) That it contains none of the recognized and essential provisions of a lease, a license or a permit.

In respect of the former, the terse statement of the Supreme Court of Virginia, in a suit where an instrument purporting to convey all the iron ore on certain lands was claimed to pass only a license to mine, but was held by the Court to be a contract of sale, is apposite:

Morison vs. American Ass'n., 110 Va., 91.

The exact language of the conveyance is not quoted in the report, but the opinion recites:

> "The conveyance in question contained all of the necessary elements of a valid deed—competent parties, a lawful subject matter, a valuable consideration, apt words of conveyance, and proper execution. It sells, without reservation, all the iron ore in question to Reuben Rose, his heirs and assigns forever."

DETAILED PROVISIONS OF EXHIBIT 2.

If now we examine Exhibit 2 in detail, we find:

(1) That the agreement was entered into January 1, 1918, more than five years before the enactment of Chapter 226 of the Laws of 1923, hence, obviously, without any purpose to circumvent its provisions.

(2) That the Sargent Land Company, from the initial recital to the end of the agreement, whenever referred to, is spoken of as the "vendor"; and in like manner the purchaser of the ore in every instance is referred to as "vendee."

(3) That, by Article II of the agreement,

"In consideration of the sum of one dollar ($1.00), to it in hand paid by the vendee, the receipt of which is hereby acknowledged, and in further consideration of the payments by the vendee, in the installments herein specified, of *the purchase price of said iron ore*, and in consideration of the covenants, agreements and conditions herein expressed to be kept and performed by the vendee, *the vendor hereby sells to the vendee all of the iron ore* in, under or upon the lands above described, and every part thereof" (R. 24).

(4) That the vendor further gives and grants to the vendee the right to enter upon said lands for the purpose of exploring for, mining and removing said iron ore, with full right and authority to construct all buildings and to lay and maintain pipes for the conveyance of water. to make all excavations, openings, roads and other improvements for mining, removing and washing said ore (R. 24).

This clause is neither necessary nor controlling as respects the interpretation of the contract, since, by the sale of the ore to the vendee, the right of access thereto became and is an incident of the vendee's ownership, without which such ownership would be valueless; the right of entry is implied in the grant of ore itself.

So it was held in

Pine Tree Lumber Co. vs. McKinley, 83 Minn., 419,

where an owner of two parcels of land conveyed to the plaintiff all of the pine timber standing on one of them. The tract so conveyed was surrounded by the lands of the defendant and of third parties, and was inaccessible, except

by passing over some part of such lands. Plaintiff thereupon constructed a logging road over the defendant's land. The court said in this connection:

"Now the grant to the plaintiff included whatever was reasonably necessary to make it effective, and it is clear that, unless the plaintiff can pass over tract one to get to and remove the pine on tract two, the grant cannot be made available. Therefore the grant of the timber and the right to enter and remove it carried with it by implication a way over tract one for that purpose; that is, a way of necessity."

In

Moore vs. Indian Camp Coal Co., 75 Ohio St., 493,

the Coal Company had received a grant from the fee owner of all the coal in and under certain tracts of land. The fact that the instrument of grant was a conveyance and not a lease was not in issue. The question in dispute was the right of the Coal Company to use the portions of the land from which it had removed coal in underground operations for transporting coal mined from other portions of the vein or bed which had been granted to it. The Court said:

"This Court has several times recognized and applied the doctrine that there may be a complete severance of the ownership of the surface of land from the ownership of the different strata of mineral which may underlie the surface, and that the creation of a separate interest in the mineral, with the right to remove the same, whether by deed, grant, lease, reservation, or exception, unless expressly restricted, confers upon the owner of the mineral a fee simple estate, which is, of course, determinable upon the exhaustion of the mine. The grant of such an estate in the mineral, in whatever form, *necessarily implies the right* to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself, having regard, at the same time, to the right of the surface owner to subjacent support." (Italics are ours.)

In

Pine County vs. Tozer, 56 Minn., 288, 293,

with reference to certain contracts selling to the vendees the pine timber upon certain lands, to be removed within a specified time, the court said:

"They also secured the very valuable right or privilege to cut and remove this timber about as they chose, for long periods of time, *including such possession of the land as was incidental and necessary to a proper execution of this right or permit.*"

And in

Mathews vs. Mulvey, 38 Minn., 342, 344,

the Court said:

"In this, the contract must be construed as a present, executed sale of all the timber, vesting the title at once in the grantee. If nothing had been said in the contract as to the time within which the timber should be cut, *there would have passed, by implication, a right to enter on the land and cut and remove the timber, certainly for a reasonable time.*"

(5) That, by Article III of the agreement, the vendor expressly warrants and defends the title of said lands and minerals, and will protect the vendee in the peaceable and quiet possession of said lands until the termination of the contract (R. 24-5).

(6) That by Article IV of the agreement,

"*The vendee expressly agrees * * * to buy, and does hereby buy*, all of the iron ore upon said described lands" (R. 25, subd. 1).

(7) That the vendee agrees to pay to the vendor for said ore, as follows: For each gross ton of dried iron ore carrying 49% or more of metallic iron, 75c per ton; and for each gross ton of dried ore carrying less than 49% of metallic iron, 50c per ton (R. 25 (a)).

(8) That the vendee expressly agrees, as one of the conditions of the contract to be strictly observed and performed by it, that it will mine, during the years 1918 and 1919, a sufficient quantity of ore to yield to the vendor in each of said years, "*as a minimum installment on account of the purchase price of the said ores*, at least the sum of $75,000.00; and during the calendar year 1920, and during each and every calendar year thereafter while this contract shall remain in force, such a quantity of iron ore as will yield to the vendor in each calendar year, *as a minimum installment on account of the purchase price of said ore*, at least the sum of $150,000.00."

(9) That it is further expressly agreed by the parties "that one of the considerations and conditions of the contract, without which it would not be made by the vendor, is, that such *respective installments of purchase price of said ore* shall be paid by the vendee during each calendar year while this contract remains in force, whether iron ore of that value be mined and shipped by the vendee in any such year or not" (R. 26).

(10) That the vendee is given until December 31, 1967, in which to mine and remove the ore purchased by it (R. 24), but, for the mutual protection of the parties, the agreement expressly provides (sub-division 4, Article IV, R. 26) that an estimate shall be made, ten years prior to December 31, 1967, of the quantity of ore then in place or in stockpile not yet paid for by the vendee, and that the *annual installments of purchase price* to be paid by the vendee during each of said last ten years shall be an amount equal to one-tenth of the value of such ore as so estimated, at the prices per ton above stated. For the purpose of deriving information upon which to base such estimate, the vendor may require explorations to be begun by the vendee at any time after January 1, 1953 (sub-division 6, Article XIII, R. 36-7). For the protection of the vendee, it is further provided that it shall not be required to pay for more ore during the last ten years than the mine contains; and that, in case it develops at any time that the ore body is less than estimated, and that the minimum installments then paid equal or exceed *the purchase price of all of said ore,* no further minimum annual payments shall be required, and the excess, if any, already paid by the vendee shall be repaid by the vendor (sub-division 4, Article IV, R. 26).

(11) That, for the further protection of the vendee, in case *all of the ore shall be paid for* before it shall be mined or shipped from the lands, then, at the election of the vendee, the term of the contract shall be extended for such period as the vendee may desire, in order to permit the mining and shipment of the ore so paid for (Article XV, R. 38).

(12) That the *annual installments of purchase price* shall be met by the vendee either by way of payments for iron ore actually mined and shipped from the land in the year in which the payments shall become due, or by payments in advance of mining and shipping, or by both such forms of

payment; and any ore paid for by the vendee in advance of mining and shipping the same may thereafter be mined and shipped by the vendee without further payment therefor (sub-division 5, Article IV, R. 26).

(13) That if the minimum installments of purchase price be promptly met, the vendee will not be required to mine and ship ore in any year if, in its judgment, it will be wise to suspend operations from time to time, or from year to year (R. 27).

(14) That the vendee specifically agrees to pay all taxes and assessments levied or assessed upon or against the described lands, and upon the iron ore mined by it therefrom (R. 33).

(15) That the contract provides that

"The title to the ore *hereby sold to the vendee* shall be and remain in the vendor, as security for the performance of this contract by the vendee, until *the purchase price of such ore*, as shall be mined and shipped from said land, or mined, treated and shipped, and taxes, and all other payments accruing and due hereunder shall have been fully paid" (R. 34).

This provision is a common one in contracts of sale of property of every kind, and, of course, does not alter the effect of the agreement, the situation of the parties not being otherwise than it would have been if the vendee had given back a purchase money mortgage to the vendor, to secure the unpaid purchase price.

Pine County vs. Tozer, 56 Minn., 288, 293.

In that case a railway company granted, bargained, sold and transferred to the defendants all of the pine timber upon certain lands in Minnesota, with the right to enter thereon and cut and remove the same at any time prior to a date named. Until the purchase price was paid, title to the timber was to remain in the railway company. The principal value of the land consisted in the timber thereon.

Pine County assessed a tax against the defendants based upon the value of the timber, upon the theory that the de-

fendants were the owners thereof. They contended, among other things, that their agreement constituted a mere license to enter upon the land and cut the timber, and to sustain this contention relied upon the clause of the contract referred to, retaining title to the timber in the vendor until the purchase price was paid.

The court held that the defendants were not mere licensees, but that they had acquired property rights in the timber of which they could not be divested without their consent, and, in respect of the particular defense mentioned, said:

"That the title thereto was to remain in the railway company until the purchase price was fully paid, did not affect the right or interest which they (defendants) had obtained."

(16) That the vendee is given until December 31, 1967, to remove the ore bought by him (R. 24, 26).

This limitation of time does not affect the nature of the contract entered into between the parties. In terms, it is a sale of the ore and nothing else. Until the arrival of the date named, the clause limiting the time within which the vendee may remove the ore lies dormant. If any ore remain on the premises thereafter, the limitation might operate to divest the estate of the vendee therein, or to leave it unavailable for further enjoyment by the vendee.

In

King vs. Merriman, 38 Minn., 47.

a suit involving a limited license to enter and cut timber during two logging seasons, the opinion written by *Judge Mitchell* said:

"Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. Sometimes these contracts are in the form of conveyances of timber; sometimes of a sale coupled with a license to enter; sometimes of a formal license to enter and cut, and again of a

reservation of the timber by the grantor in a conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. *Any other construction would be against the express intention of the parties.*"

In

Mathews vs. Mulvey, 38 Minn., 342,

involving a contract of sale of all the pine timber on certain lands, with a conditional limitation that the vendee was to have as long as he wished to cut the same, provided he paid the taxes on the land, the Court said:

"*When this right should expire, the practical effect would be to divest the right in the timber,* or at any rate to leave it a barren and unavailable right, for, as the Court said in the case referred to, *King vs. Merriman,* 38 Minn. 47, 'it would be an anomaly in the law that one man should own standing timber on the land of another, with no right of entry to cut and take it away.' As the title to the whole of the timber passed at once on the execution of the contracts, *the limitation as to the right to cut is in the nature of a condition subsequent for defeating the vested title.*"

In

Kingsley vs. Hillside Coal & Iron Co., 144 Pa. St., 613,

involving a contract which the Court construed to be a sale of all of the coal underlying certain premises, and not a lease or license to remove the same, we find the following:

"Where a fair interpretation of the written agreement shows that a sale was intended by the parties, and a right to mine and remove all of the coal is conferred by it in express terms, or by plain and necessary implication, it will constitute a sale, *notwithstanding a term is created within which the coal is to be taken out.*"

In

Hope's Appeal, 29 Wkly Notes of Cases, 365,

as recited in the opinion in *Denniston vs. Haddock,* 200 Pa. St. 426,

"The agreement, though called a 'lease,' was a purchase of the ore at a fixed price per acre, making a limited gross sum, *which was payable absolutely in installments ending within* 13 *years,*"

it was held that the instrument was a contract of sale and should be construed in accordance with the principles governing such an agreement. The decision was affirmed, without opinion, by the Supreme Court of Pennsylvania, in 3 Atl. 23.

In

In re Lazarus' Estate, 145 Pa. St. 1,

a lease of certain lands provided that the lessees should have all the coal underlying the lands for the term of 99 years. The lessees were to mine a specified minimum number of tons of coal each year, and to pay so much a ton therefor, until all of the available coal was removed; and the said minimum number of tons was to be paid for annually, whether mined or not; the lessees were to pay also all taxes, imposts or excises laid upon the coal, or in any manner connected with the mining operations. The court held that this was an absolute sale of the coal, conditioned on its being removed. The question seems to have arisen as to the nature of the contract, growing out of the fact that payments for the coal were to be made in annual installments. The court said:

"It is obviously immaterial that in Hope's Appeal the consideration is payable *in solido,* while here the consideration, beyond the stipulated sum payable in any event, is regulated according to the rate per ton for the coal which may be mined; *for this is simply a difference in the mode of payment of such consideration.* Nor is it material that no coal has been nor may be mined within the term specified. The grantee has the absolute and exclusive right, under the conveyance, to mine all the available coal contained in the tract described; and it rests with him alone whether or not there shall be a reversion. If he should exercise his right within the term, the coal will by severance have become absolutely his, and his grantor will have received its equivalent in cash,

as in the case of an ordinary sale; *if not, his inaction will simply amount to a voluntary forfeiture of such rights.*"

Fifty years is a long time, and many unforseen conditions may develop which, conceivably, may render impracticable, if not impossible, the fulfillment of the contract as originally contemplated. Accordingly, Exhibit 2 provides,

(17) That at any time prior to January 1, 1958, the vendee may, upon six months' notice to that effect, terminate the contract, provided that all of its terms and conditions obligatory upon the vendee have been observed and performed up to the time of such termination (R. 38).

This, however, is a condition subsequent which in no wise affects the character of the transaction between the parties, until and unless the vendee shall exercise the privilge thus given to it.

Mathews vs. Mulvey, 38 Minn., 342, *supra.*

Reservation of right of termination by either party does not change the present status of the grantee; the execution and delivery of Exhibit 2 vested in it the title to the iron ore absolutely and immediately, subject to a limitation, not a conditional estate, but an estate *in fee* subject to divestiture upon the happening of an uncertain event which has not yet occurred.

Frick vs. Lewellyn, 298 Fed., 803, 810.

The portions of the sale-agreement not hereinbefore referred to, for the most part, are what may be called administrative provisions, [illegible]fine the methods that shall be employed by the vendee in exploration, and in mining and removing ore, stockpiling the same, sampling, analyzing, beneficiating, shipping, weighing, etc., with express provisions relating to the preparation, and submission to the vendor for approval, of mining plans, and the transmission to the vendor of reports of operations. All of

the requirements of these portions of the agreement are essential to insure the production of the largest quantity of merchantable ore from the premises, the prevention of waste and the proper conservation of the ore deposit for future recovery in case of the termination of the agreement.

Because all of the land had not been fully explored, the quantity of ore existing on the premises described in the contract of sale, and the aggregate purchase price thereof, were not stated therein; and, those matters not being issues in the case, no proof or stipulation respecting the subject appears in the record. It may be assumed, however, from the figures that do appear in the agreement, to-wit, a term of fifty years in which to mine and remove the ore, and annual installments after the first two years of not less than $150,000.00 each, that the mineral deposit is a very extensive one, and that the question of the taxability of the installment payments of purchase price, under Chapter 226 of the laws of 1923, is one involving very substantial sums.

As has been intimated to the court, Chapter 226 is an unusual, if not an unique Act. As far as a studied use of language can effect the legislative purpose, the operation of the act is strictly confined to royalties received by a taxpayer "for permission to explore, mine, take out and remove ore from land" in Minnesota.

That the mining and removal by *a fee owner* of his own ore does not subject him, in any way, directly or indirectly, to taxation under the provisions of Chapter 226, is not asserted by anyone.

Again, no claim is advanced that the proceeds of a sale of ore in place, where the full purchase price is paid in a lump sum, are taxable under Chapter 226. Such a case existed in the sale by the Sargent Land Company, in September, 1923, of one of its mines for a money consideration then paid by the purchaser (Stipulation of Facts, R. 61), and no attempt, or assertion of

a right, to levy or collect a royalty tax upon any portion of the purchase price thereof has been made by the State of Minnesota, or by any of its officials.

How, then, can such tax be enforced against the purchase price when paid in installments? Manifestly, it cannot be.

In re Lazarus' Estate, 145 Pa., 1, *supra,* p. 68.

Section 2 of Chapter 223 of the laws of 1921 (the occupation tax law) provides that the valuation of ores for the purpose of determining the amount of tax to be paid (the value of ore mined being the measure of the tax) shall be ascertained by *subtracting* among other things, *from the value of the ore where it is brought to the surface "the amount of royalties paid on the ore mined or produced during the year";* yet, though insisting that payments made by a vendee under Exhibit 2 and similar outstanding contracts are "royalties" subject to taxation under Chapter 226 of the laws of 1923, *the appellees refuse to recognize and allow them as deductions, in the nature of "royalties," in determining the measure of the "occupation-tax" liability of such vendee under said Chapter 223.* For the purposes of the occupation-tax law, such payments are considered to be installments of purchase price which cannot be deducted in ascertaining the measure of the occupation tax.

The question then is: Is the contract, Exhibit 2, *in law,* what it is in form and in fact, namely, a contract of sale vesting in the vendee the title to the ore described?

INTENTION OF PARTIES MUST PREVAIL.

That *the purpose of the parties* was to effect the sale and transfer from the vendor to the vendee of the ore is beyond controversy, and up to this time no one has asserted otherwise. There is not a syllable in the contract, from beginning to end, to sustain the contention that the instrument is to be construed as if it were an

ordinary mining lease; hence, if it be so construed by this court, it must be by reason of some principle of law which has not as yet been pointed out.

That an owner of lands containing mineral deposits can separate the ownership of the surface and the minerals by a conveyance of the one or the other, or by a reservation to himself, in a sale of the portion not sold, is well settled.

State vs. Evans, 99 Minn., 220, 225-6.
Washburn vs. Gregory, 125 Minn., 491, 493.

That is what was done in the instance under consideration. While retaining the title to the surface of the land, the Sargent Land Company sold and disposed of the mineral deposits underlying it, and vested the title to the same in its vendee. To this extent, then, the transaction was not in any respect unusual, and, after the execution and delivery of the agreement, Exhibit 2, each party owned in severalty an estate in the described lands, and each was at liberty to use and enjoy, as it saw fit, the particular property-interest belonging to it.

CONCERNING MINING LEASES.

It is the doctrine of the courts of Minnesota, as of this Court, that a mining lease, in the common form, is a lease in fact, as well as in name, and that royalties payable thereunder, on account of ore mined and removed from the lands covered by the lease, are rents, of a similar nature to those defined under ordinary land leases.

State vs. Evans, 99 Minn., 220.
von Baumbach vs. Sargent Land Co., 242 U. S., 503.

This conclusion has not been reached without a great deal of legal doubt and some hesitation, and, perhaps also, not without some regard to what were deemed necessities of the situation, as in the *Evans case* above cited. Mining leases had their origin under the technicalities of the English common law, and the

ingenuity of the common law judges was well nigh exhausted in endeavoring to demonstrate that, under a wasting lease of that kind, minerals removed from the land constituted merely the usufruct of the occupation of the land by the lessee. When the English colonists came to this country, they brought with them the more or less familiar forms of contracts which had obtained in the mother-land, and, without consideration of the illogical reasoning that led to the conclusion referred to, these forms were adopted and have persisted in the United States wherever mineral developments have occurred. But the subtle refinements that were required to distinguish between the rights of the respective parties, and of tenants for life or for years, and of remaindermen, dependent upon the condition of the property at the time such leases were made, simply resulted, as necessarily they must, in creating a state of profound confusion. Thus, the distinctions that were laid down between leases covering lands upon which mines were already opened, and those of lands containing mineral which had never been developed as mines, and the discrimination that was solemnly made between the letting of land "with the mines," and the instances where those words were omitted, simply eventuated in absurdities.

A departure, therefore, in explicit terms, from these archaic forms is not only reasonable but desirable, and the Sargent Land Company and other fee owners, some ten or fifteen years ago, determined to frame their contracts accordingly. It therefore seems extraordinary that their clear intentions may be disregarded, and that they be held to restrictions imposed by the antiquated reasoning of several generations of common law judges in respect of agreements of an entirely different character and purport.

It is a matter of common knowledge that the usual mode of recovering iron ore in Minnesota is by operators working under mining leases.

Oliver Iron Mining Co. vs. Lord, 262 U. S., 172, 180-1.

It appears from the agreed statement of facts in the case at bar (R. 63) that in the year 1923 there were in the State of Minnesota 120 iron mines operated by lessees, and 4 mines operated by their owners.

In practical effect (though, as we have seen, the technical legal construction is to the contrary) the removal of ore under a mining lease is essentially a sale, the land being worth nothing after the ore is exhausted by reason of the caving of the surface (the chief value of the lands here involved is in the deposits of ore thereon, R. 60, subd. 5); and royalties paid thereunder constitute (in practical effect), so far as the fee owner is concerned, installments of purchase price of the ore. An agreement of sale, therefore, far more accurately expresses the essence of the transaction than can a lease creating the restricted and illogical relation of landlord and tenant. In this instance, the parties elected, as they had a right to do, to make their contract in accordance with, and to express, the actual transaction agreed upon by them, and it is respectfully submitted that no court is empowered to deny them that privilege, and to make a different contract for them. Not only that, but, the agreement of sale unequivocally expressing the intent of the parties, the court is bound to respect it and to protect the interests of the respective parties thereunder. Those interests both parties have fully recognized for nearly eight years. How can a third party, asserting no proprietary right whatever in the property, now be heard to insist that the *vendor* is the owner of the ore, and that the vendee has merely *a lessee's* right in it? That contracts covering the disposition of ore in place have been quite commonly in the form of mining leases, does not, as the courts have often held, preclude the disposition of such property under other forms of agreement; and the mere fact that contracts of sale in the form of Exhibit 2 are infrequently met with must not be allowed to lead to the conclusion that there is no distinction between the two types of agreement. If there were none, no purpose would have been served in adopting the contract

of sale. It was employed intentionally, and deliberately, for the express purpose of recognizing and emphasizing, and securing the advantage of, the distinction.

If minerals had been disposed of by agreements in the form of Exhibit 2 for generations, would there be any justification in declaring a mining lease, in the form of Exhibit 1, to be a conveyance of the title to the ore, merely because it differed from the usual form of contract?

CONCERNING THE INTERPRETATION OF EXHIBIT 2.

The purpose of rules of construction is to reach the probable intent of the parties, and "a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language, but will enforce the contract according to its terms."

13 *Corpus Juris*, 520.

The intention of the parties is to be deduced from the language employed by them:

> "To ascertain the meaning of a written agreement in which no technical word or expression is used, nothing is to be looked to except the language employed, taken in its ordinary sense, the subject matter, and the surrounding circumstances."
>
> *Vinton Petroleum Co. vs. Sun Co.*, 230 Fed., 105, 108. (C. C. A., 5th Circ.)

> "The first rule of construction is that the intent of the parties, as expressed in the words they have used, must govern. And in the absence of fraud or mistake, parol evidence cannot be received to add to or vary the contract as written."
>
> *President Suspender Co. vs. MacWilliam*, 238 Fed., 159, 164.

> "There is no charge of fraud, and the rights of the parties must be determined by the written agreement which clearly stated their respective rights and interests in the property."
>
> *Kerting vs. Hatcher*, 216 Ill., 232.

"It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into; and, if not forbidden by law, is to be effectuated."

Bradley vs. Packet Co., 13 Pet., 89, 97.

The Supreme Court of Minnesota, in

State vs. Royal Mineral Association, 132 Minn., 232, 234,

has recognized that,

"A contract regarding mineral in place may be a sale, *or* a lease, *or* a license, *depending on its terms.*"

The Supreme Court of Pennsylvania has made a similar explicit statement in saying:

"A contract regarding minerals in place may be a sale absolute, a conditional sale, a lease in the ordinary acceptation of that term, or a mere license to mine and remove the minerals."

Girard Trust Co. vs. Del. Hudson Co., 246 Pa. St., 161.

Of course such statements are elementary.

But the present case seems to be an instance where elementary principles have been somehow overlooked.

The failure of the trial court to give due force and effect to the provisions of the sale-agreement in this case is a denial of the contract rights of the parties thereto, and amounts in effect to the exercise of a power, the existence of which in a court has always been denied, for it is primer-law that courts have no power to make contracts for parties, and quite as little to change the contractual status agreed upon by them.

No reason has been suggested why the agreement now before the Court should not be construed pursuant to its terms, and in accordance with the intent of the parties as clearly indicated therein.

In

Denniston vs. Haddock, 200 Pa. St., 426 (50 Atl., 197), this was discussed by the Court, as follows:

> "It has been said in a number of cases, that a conveyance of the right to mine and remove all of the coal in a given tract of land is a *sale* of the coal in place, *although the conveyance may be called a 'lease.'* The expression is unfortunate, for, while it may have produced no erroneous result in the cases where it is used, *it tends to substitute the general rules appertaining to sales for the rules properly applicable to the particular contract that may be under consideration by the Court.* Thus, for example, in Hope's Appeal, 29 Wkly. Notes Cas. 365, which is practically the starting place of the error, the agreement, though called a 'lease,' was a purchase of the coal at a fixed price per acre, making a limited gross sum, *which was payable absolutely in installments* ending within 13 years, though the lessee had a nominal term of 99 years in which to remove the coal. It was justly said by the learned Court below, whose decision was affirmed here, that *it was 'manifest that the parties contemplated an actual sale of the coal, and not a lease, in the ordinary use of that word.'* * * *
>
> "The point to be noted is, that *the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms."* (Italics are ours.)

Conversely, and more clearly, where the agreement is undeniably one of sale and not of lease, there is no warrant, *especially when no question as to its meaning is raised by any party in interest,* to refuse to construe the instrument "by its own terms."

In a later case, *Gallagher vs. Hicks,* 216 Pa. St., 243 (65 Atl., 623), it was said:

> *"Nor is it disputed that a contract regarding coal in place may be a sale absolute, a conditional sale or a lease.* There is nothing revolutionary in the cases referred to. In *Dennison vs. Haddock* it was pointed out that in *Hope's Appeal* (3 Atl., 23) there was in fact a sale of the coal in place, and the case was correctly decided on that basis. But an unfortunate expression in the opinion had been the starting point

of *a tendency to class together all contracts about coal in place as absolute sales, without due regard to each particular contract, and the obligation to interpret it by its own terms and intent.* What *Denniston vs. Haddock* and the cases which have followed it did was, to check the tendency to *indiscriminate lumping of all such contracts together,* and to recall, in regard to them, the true principles of construction applicable alike to all contracts." (Italics are ours.)

The language in *Denniston vs. Haddock* and *Gallagher vs. Hicks,* upon this subject, was approved and reiterated in *Hollenback Coal Co. vs. Lehigh etc. Coal Co.,* 219 Pa. St., 124 (67 Atl., 987).

The brief memorandum of the trial court in the case at bar seems to indicate a lapse into "indiscriminate lumping of all such contracts together." Here was a departure, *ex industria,* by the parties to the agreement from the conventional lease form, and a studied adoption of a sale-agreement.

Frequently mining leases embrace provisions that are consistent with the purpose to pass to the lessee title to the ore affected thereby, and such leases have been construed by the courts as sales.

Hope's Appeal, 29 Wkly. Notes Cas., 365 (affirmed, 3 At. (Pa.), 23).
Plummer v. Hillside Co., 104 Fed., 208.
Bolland vs. O'Neal, 81 Minn., 15.
In re Lazarus' Estate, 145 Pa. St., 1 (23 Atl. 372).

"The term 'sale,' as ordinarily used, means the transfer of the absolute or general property in the thing sold. In determining whether a mineral lease of the kind here in question is a sale, neither the name nor form given to it by the statute is controlling."

State vs. Evans, 99 Minn., 220, 225.

But no language in Exhibit 2 can be construed to indicate an intention of the parties to enter into the relation of landlord and tenant.

The situation is further clarified by the fact that, if the agreement Exhibit 2 is to be construed as a mere mining lease, so that payments thereunder are in the nature of "royalty," such construction can only be arrived at by a complete disregard of the specific language of the contract, and by the necessary assumption that the Sargent Land Company *is still the owner of the ore, since only an owner can be a landlord.* By assuming the role of a tenant, the lessee acknowledges the proprietorship of the landlord in the leased property, and is not suffered to question his title.

This is one of the tests applied to determine the nature of such a contract by the Supreme Court of Minnesota in

State vs. Royal Mineral Ass'n., 132 Minn., 232, 234-5.

Reviewing the authorities distinguishing between mining leases and sales of mineral in place, and referring to some of the earlier Pennsylvania decisions, it was said:

> "On this point these earlier cases are overruled by the later cases above cited, which hold, in substance, that, *while a contract regarding mineral in place may be a sale, or a lease, or a license, depending on its terms,* an instrument such as the instruments we have here under consideration is at common law a lease without impeachment of waste. * * * It follows logically that the amounts stipulated to be paid by the lessees are rents, and they were expressly held by this Court to be rents in the Boeing case, supra, a case which involved a construction of the very leases now before the Court. They are 'the compensation which the occupier pays *the landlord* for that species of occupation which the contract between them allows.' Lord Dennison, in *Queen vs. Westbrook,* 10 Q. B. 178, 205."

In

Moore vs. Sawyer, 167 Fed., 826,

the plaintiff had entered into a contract, in the form prescribed by the Secretary of the Interior for leasing of Creek Indian lands in the State of Oklahoma, which, as recited in the opinion, purported, in consideration of the royalties and other stipulations

therein contained, to demise, grant and let to one of the defendants, for the term of 15 years, all of the oil deposits and natural gas in or under said land, with the right to prospect therefor, "and other rights usually incident to such leases."

It was contended by the defendant that this was a conveyance in fee of the oil in place, in respect of which contention the Court said:

> "The instrument here considered is termed a 'lease,' has a definite term of 15 years, and provides for an annual royalty or rental. * * *
>
> *"Applying to this instrument the ordinary rules of construction, and considering all its parts with a view to harmonizing them and arriving at the real intention of the parties,* it is, in my opinion, simply a lease, the $50.00 mentioned being a bonus paid or agreed to be paid to induce its execution."

If construed according to its terms, Exhibit 2 must be held to a sale of the ore therein described, and the payments provided for under the agreement must be deemed purchase price, and not royalties for permission to explore, mine, take out and remove ore, taxable under Chapter 226.

Pritchard vs. McLeod, 205 Fed., 24,

is a decision by the Circuit Court of Appeals of the Ninth Circuit, involving the construction of a certain instrument made between the plaintiff and defendants, the pertinent portion of which reads as follows:

> *"Whereas the party of the first part agrees to sell and the party of the second part agrees to buy all of the placer mining claims* (with the exception of one certain claim in the vicinity of Dearborn Discovery on the Inmachuk), also warehouses, houses, stables, china, and centrifugal pumps, boilers, engines, one horse, scows, tents, forges, stoves, hoes, belts, machinery, and tools of every description, camp outfit of every description, and lots and water rights owned by said party of the first part in the Fairhaven mining district, Dis-

trict of Alaska, for the sum of thirty thousand dollars ($30,000.00) upon the following terms and conditions:

"1. One thousand dollars ($1,000.00) down, the receipt whereof is hereby acknowledged.

"2. One thousand five hundred dollars ($1,500.00) note due and payable on November 6, 1908.

"3. Two thousand five hundred dollars ($2,500.00) note due and payable April 6, 1909.

"4. Twenty-five (25) per cent of the gross output of gold taken from any of the claims or fractions of claims sold by the party of the first part to the aforesaid party of the second part, to be paid over upon demand to said party of the first part until the sum of twenty-five thousand dollars ($25,000.00) is paid in full.

* * *

"10. *The intent and purpose of this agreement is that the party of the first part sells to party of the second part* all his real and personal property, of whatsoever nature, kind, or description, now owned by party of the first part in the said Fairhaven mining district."

The action was brought to recover the stipulated installments of $1,500.00 and $2,500.00 of the agreed purchase price. The opinion disposes of the nature of the contract in brief language, as follows:

"The view that the agreement is a mere option is untenable. The 'party of the first part agrees to sell and the party of the second part agrees to buy. The intent and purpose of this agreement is that the party of the first part sells to the party of the second part all his real and personal property,' etc. So reads the instrument. The obligation of McLeod to pay the items of $1,500.00 and $2,500.00 (evidenced by two promissory notes), upon November 6, 1908, and April 6, 1909, respectively, is absolute, and wholly independent of any contingency whatsoever."

The case was before the Court on a demurrer to the sufficiency of the complaint. The demurrer was overruled, and the remainder of the opinion was devoted to questions that might arise upon the trial of the case on its merits.

Globe Lumber Co. vs. Lockett, 106 La. Ann. 414,

was an action to avoid an assessment made against the plaintiffs upon certain timber standing upon property, the title to which was in a third party, the plaintiff claiming that it had no taxable interest in the timber under "certain written acts" which granted, bargained, sold, transferred and conveyed to plaintiff all the pine and oak timber, ten inches and over in diameter at the stump, growing, standing or lying upon certain described lands.

In addition, the agreement granted plaintiff the right to enter upon the land to cut, remove and transport the timber therefrom, and the purchaser was granted a term of fifteen years in which to do this. Touching the nature of these so-called "written acts," the Court said (page 416):

> "Undoubtedly they evidenced the *conveyance* of tangible property. The acts are sales, good and valid in form and substance, of property. After their execution every stick of timber, every tree, on the 10,400 acres of land, of the size and dimension of ten inches and over at the butt, became the property in full ownership of the purchaser, and there was accorded to the latter, as part of the transaction, the privilege to go upon the land for the purpose of cutting and removing the trees—this right to be exercised at the will of the purchaser for a period not longer than fifteen years. So that as a result of the sales, the plaintiff company acquired (1) the timber itself; (2) the right of entering upon the land to get it out.
>
> "It is true, the land upon which the timber stands is assessed to the owners of the fee, and the timber, separately, is assessed to plaintiff Company. * * * If the property in standing timber may be sold and conveyed separately from the land, and no one disputes this, then it may be, when thus sold, separated from the land on which it stands for the purpose of taxation."

In the case at bar, the vendee expressly agrees to pay all taxes and assessments.

Lanham vs. Henry, 135 Ga., 429,

involved the construction of a certain instrument in which it was

recited that the grantor "hath granted, bargained, sold and conveyed, and doth by these presents grant, bargain, sell and convey unto the said (grantee) his heirs and assigns, all the metallic ore and mineral interest of every description, and all ore and mineral of every kind and quality in, upon, or that may be found in or upon, a certain" described parcel of land, with the exclusive right and privilege of entering upon the premises, to take out, remove and dispose of such minerals, at any time within twenty-five years from the date of the instrument.

Without any discussion whatever, the Supreme Court affirmed the judgment of the Court below, holding that the instrument did not constitute a lease of mineral interests in the land for the said period of twenty-five years, nor a mere option or right to purchase such interest within that period; but that it conveyed to the grantee the absolute title to all the mineral described in the land.

In

Hosack vs. Grill, 204 Pa. St., 97,

an instrument which purported to "bargain, sell and convey" all the mineral coal in, upon and under a certain tract of land, and to grant the right to enter on the land and search for and remove coal in consideration of payment by the other party of a stipulated sum annually, and a further sum as royalty upon each ton of coal mined, was held to be a sale of the coal in place. In this case the instrument did not fix a term of years for the removal of the coal.

So also, in

Manning vs. Frazier, 96 Ill., 279,

under an instrument by which the owner of land, in consideration of a certain royalty per ton, "bargained, sold and conveyed" all of the coal in, upon and under said land, with an express license to the grantee, his heirs and assigns, to enter and search

for the coal, and mine and remove the same, was held to be a sale of the coal, and to sustain the enforcement of a vendor's lien for purchase money unpaid under the agreement.

See also

Gardner's Estate, 199 Pa. St., 524; 49 Atl., 349.
Plummer vs. Hillside Co., 104 Fed., 208.
In re Lazarus' Estate, 145 Pa., 1.

Agreements in the form of Exhibit 2 have not been presented for interpretation to any of the State courts of Minnesota. Before the discovery of iron ore in that State, however, the chief of its known natural resources was the extensive tracts of pine timber which covered a large portion of the northern part of the State. In many instances this timber, which now, unfortunately, has been practically exhausted, was disposed of by its owners under agreements substantially similar to those now used in connection with iron ore deposits. Those agreements were variously in the form of licenses, timber leases or contracts of sale of the timber in place. They were not always scientifically drawn, and from time to time question arose as to the real nature of the agreement. There is no distinction in principle between agreements relating to the cutting and removal of timber and those concerning the mining and removal of ore in place, and the decisions of the Supreme Court with reference to the former are applicable and controlling in respect of the latter.

Mathews vs. Mulvey, 38 Minn., 342,

was an action of trespass for cutting and carrying away pine timber belonging to the plaintiff.

The then owners of certain lands made a written contract with the plaintiff in which it sold to him all the pine timber on the land described, "said Mathews to have as long as he wishes to cut the same, provided he pay the taxes on said lands." The plaintiff neglected to pay taxes thereafter becoming due, by reason whereof the lands were sold by the State in accordance

with the statute, and were bid in by the State at the sale. Subsequently the plaintiff redeemed the lands by paying to the State the amount then due, including penalties and interest, such redemption being effected December 9, 1884. On December 4, 1884, the owners of the land conveyed the same by warranty deed to the defendants, who, however, at the time they accepted the deed, knew that the timber had been sold to the plaintiff. Judgment was rendered in the action in favor of the plaintiff, and the defendants appealed. *Chief Justice Gilfillan*, in delivering the opinion of the Court affirming the judgment appealed from, said:

"The contract in this case differs from that in *King vs. Merriman*, 38 Minn., 47, in that the contract in that case granted only the 'right, privilege, and permission to enter and cut,' during a specified time, all the pine timber fit for saw-logs growing on certain land described; while in this case the contract is, in terms, a sale of 'all the pine timber' on land described, 'said Mathews to have as long as he wishes to cut the same, provided he pay the taxes on said land.' In that case (the Merriman case) the contract was held to be one for the sale of only so much timber as the grantee might cut during the time specified, and that he had no interest in timber remaining uncut at the expiration of that time. In this, the contract must be construed as a present, executed sale of all the timber, vesting the title at once in the grantee. If nothing had been said in the contract as to the time within which the timber should be cut, there would have passed, by implication, a right to enter on the land, and cut and remove the timber, certainly for a reasonable time. But the grantee is given 'as long as he wishes, provided he pay the taxes on the land.' When this right should expire, the practical effect would be to divest the right in the timber, or at any rate to leave it a barren and unavailable right, for, as the Court said in the case referred to, 'it would be an anomaly in the law that one man should own standing timber on the land of another with no right of entry to cut and take it away.' As the title to the whole of the timber passed at once on the execution of the contract, the limitation as to the right to cut is in the nature of a condition subsequent for defeating the vested title, and not, as in the case of *King vs. Merriman*, a mere description

of the timber, (to-wit, that cut within the specified time,) the title to which should pass."

The Court then declared that the provision of the contract in respect of payment of taxes was for the protection of the interests of the grantors in the land, and that the redemption from the sale for delinquent taxes effected such protection as fully as if the plaintiff had paid the taxes before delinquency.

Another case was

Pine County vs. Tozer, 56 Minn., 288.

This case involved liability of the defendants to pay a tax levied upon their alleged interest in certain timber upon railroad lands in Pine County, Minnesota.

The fee title to the lands was vested in the St. Paul & Duluth Railway Co., which, under the existing statute, paid into the State Treasury each year 3% of its gross earnings in lieu of any taxation of its lands, so long as they remained unsold. In its essential provisions, the contract respecting the timber closely resembled Exhibit 2.

The company "granted, bargained, sold and transferred" to the defendants, all of the pine timber standing, growing or being upon certain of these lands, with the right, privilege and permission to enter thereon and cut and remove said timber at any time prior to a date named, and, when so cut and removed, and upon due payment of the purchase price, to control, own and possess said timber. One of the contracts (typical of all) provided that the defendants should pay to the Railway Company $10,000.00 a year on account of the purchase price of the timber, and, if more than 8,000,000 feet of logs should be cut in any year, unless such excess had been paid in advance of cutting by earlier installment payments, the defendants should pay $1.25 per thousand feet of such excess in addition to the specific annual installment. Until the purchase price was paid, title to the timber was to remain in the Railway Company. The principal value of the land consisted in the timber thereon.

The defendants contested the validity of the tax assessment made against the land, upon the ground that the contract constituted a mere *license,* and that no taxable interest in the real property was created in them by the contracts referred to. It became necessary therefore for the Court to construe these contracts and to ascertain the nature of the rights acquired thereunder by the defendants.

The Court stated (at page 293):

> "We are not required to fully determine exactly what title the persons who contracted for this timber acquired therein, or what their rights were. But it ought not to be urged, with any hope of success, that by means of the contracts they had secured nothing more than a bare license to go upon the lands, and to cut and remove the timber until forbidden so to do by the Railway Company, and should the right of entry be refused, their only remedy would be an action to recover damages as for a breach of contract: yet this is really the position of counsel for one of the appellants.
>
> "Under these contracts, the purchasers had secured the right to enter upon the lands and to cut and remove the timber. *That the title thereto was to remain in the Railway Company until the purchase was fully paid, did not affect the right or interest which they had obtained.* * * * They had obtained the right of entry upon the land and of possession for many years, for the purpose of cutting and removing the timber, and they had undoubtedly an interest which would have been subject to seizure and sale upon execution, not as personalty but as real estate. Their interest was not that of a licensee,—simply to go upon and occupy the land and cut and remove the timber until the license was revoked; but there was a valid grant of the right and privilege of occupying the land, and cutting and removing the timber, a part of the realty, which, when severed, would become personalty. They had acquired property rights which could not be taken away from them."

The conclusion of the Court was that defendants had an estate in the lands subject to taxation.

The case last cited has further application.

The tax attempted to be created by Chapter 226 is held by the lower court to be a property tax. Since royalties for permission to mine and remove ore are, according to the declaration of the legislature (see title of Act, R. 42), moneys paid to the *owners* of the ore removed, it follows that the property actually taxed is the ore.

But, the opinion in *Pine Land County vs. Tozer* just quoted, shows that *the vendee* under Exhibit 2 acquired "undoubtedly an interest which would be subject to seizure and sale upon execution, not as personalty, but as real estate."

By section 8 of chapter 226, the royalty tax is declared to be "a specific lien, from the time it is due and payable, upon all and singular the right, title and interest of the person to whom such royalty is payable in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid."

Section 10 prescribes the procedure for the collection of an unpaid royalty tax by an action *in personam*, brought against *the owner*, which judgment "shall be a lien upon all right, title and interest of the tax payer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation, with interest at the rate of one per cent a month, and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution."

If, therefore, the tax be a property tax upon the interest of the owner of the ore in place (which is real estate), a judgment for the payment of such tax can be collected only from that specific interest, and it follows that it was the clear intention of the legislature, clearly expressed, to exact the tax *from such owner* and not from *his vendor* from whom he derives title.

In

Bollard vs. O'Neal, 81 Minn., 15,

the owner of certain land, in the language of the Court, "executed in the usual form, under seal, a certain instrument by which he sold the standing pine on the land to defendants." The granting clause was as follows:

> The grantors "do by these presents, grant, bargain and sell unto the said parties of the second part, their heirs and assigns, the right, privilege and permission to enter upon the following described tract of land (here follows description) at any and all times prior to the 6th day of June, 1899, on which last mentioned date this permit shall cease and terminate, and cut and remove from said lands, during said time, all of the pine timber standing or being thereon."

While the defendants were in possession of the land and engaged in removing the timber, the land was conveyed by the owners, without reservation of the pine, to the plaintiff, who brought the action to recover damages for the cutting and carrying away of the timber.

The deed to the defendants was not placed of record and the plaintiff claimed to be an innocent purchaser without notice, but the Court held that the occupancy of the premises and the logging operations, which were extensive, were constructive notice of the rights of the defendants under their deed, and put the plaintiff upon inquiry.

In respect of the nature of the contract between the owner of the land and the defendants, the Court said:

> "The deed from Wray to Mulvey and Carmichael (defendants) was not a mere license revocable at the will of the grantor. It was in effect a conveyance of the pine, with the privilege to go upon the premises within a stipulated time and remove it."

Upon principle, as well as under the authorities, then, Exhibit 2 is a *contract of sale*, and ownership of the ore passed thereunder to the vendee.

As a necessary sequence, the purchase price installments fall-

ing due under the contract do not constitute "royalties" for permission to mine and remove ore, for the right to remove it inheres in *its ownership,* and constitutes the dominion which is the essense of property and endues it with value; without the power of dominion proprietorship is nominal and worthless.

We resort once more to the dictionaries to elucidate the matter. Thus the *Century Dictionary*:

> "*Dominion*: (a) The right of uncontrolled possession, use and disposal; power of control.
>
> (b) *Act of Dominium*: *In law,* an act tantamount to an exercise of ownership."

According to *Webster,*

Dominion is "the power of governing and controlling; independent right of possession, use and control. *Law.* Absolute ownership or *dominium* (which see)."

And, under the title *"Dominium,"* we find:

> *"Law,* ownership; control; authority. In the Roman law, *dominium* in its widest sense includes all rights in rem over things; but its general use is the name of the largest or fullest right (as distinguished from lesser rights) or power over any determinate thing, unrestricted in power of disposition, unlimited in duration and indefinite in extent of user. See *ownership."*

Turning to "Ownership," we find it defined as follows:

> "State, relation, or fact of being an owner; exclusive right of possession; lawful claim of title; property; proprietorship; dominium."

In

Baker vs. Westcott, 73 Texas, 129,

"dominion" is defined to be the right in a thing from which arises the power of disposition, and the right of claiming it.

In the case at bar, the trial court said, in its principal memorandum (R. 73):

> "Looking through the Act (Chapter 226, Laws of 1923), however, at the real substance thereof, it is essentially a tax

upon the interest in the land *owned* by the person by whom the tax should be paid, and it is so considered in the determination of this case."

If this hypothesis be adopted, the decree cannot stand, since, as we have seen, the interest in the land represented by the ore was no longer *owned* by the Sargent Land Company, its property interest therein having been transferred to the vendee named in Exhibit 2. The Sargent Land Company, *not being the owner of the property*, is not subject to taxation, therefore, under Chapter 226. It elected *to sell* the ore, and its vendee elected to buy it, instead of contracting for the removal of the same under a mining lease. Such a transaction interfered with no rights of others and offended no statute or principle of law. The parties also agreed that the purchase price should be paid in installments, which likewise was undeniably lawful, and Chapter 226, constitutionally considered, is ineffective and void as respects any application to their contract.

In

Dawson vs. Kentucky Distilleries Co., 255 U. S., 288,

this court held unconstitutional a legislative Act "which imposed upon every person engaged in the business of manufacturing whisky, or in the business of owning and storing the same in bonded warehouses within the State, what was called an 'annual license tax' of 50c per gallon upon all whisky, either withdrawn from bond or transferred in bond from Kentucky to a point outside that State."

This Court approved the statement of the lower Court that "the thing really taxed is the act of the owner in taking this property out of storage into his own possession (absolute or qualified), for the purpose of making some one of the only uses of which it is capable: that is, consumption, sale, or keeping for future consumption or sale."

In other words, the tax was attempted to be laid upon the exercise of a right (with which a court has no power to interfere)

that inheres in ownership of property, and was constituted a tax on the property itself, which it was conceded would not be "uniform upon all property of the same class subject to taxation" as required by the State constitution.

The English case of

Foley vs. Fletcher, 3 H. & N., 769,

has a direct bearing upon the question of the taxability of these installment-payments of purchase price. It disposes of the erroneous conception that postponement of payment of the considsideration for ore sold by mine-owners under contract is a fact of importance in determining the character of the payment as being capital or income, and it very conclusively shows that they are not the latter. It cannot be denied that, if in the case at bar the installment payments made by the vendee under Exhibit 2 are payments of purchase price of the ore, and represent merely its conversion into money, they cannot be taxable under Chapter 226 as royalties, which, as defined by Section 2, are the consideration for "permission to explore, mine, take out and remove ore."

In the English case, the question arose as to whether similar installment-payments of purchase price were subject to taxation under the income tax Act. The plaintiff in the case, being the owner of an undivided one-half of an estate containing coal mines, joined with her co-tenant in a sale thereof to the defendants. The contract provided that the plaintiff's portion of the purchase price should be paid in semi-annual installments extending over a period of thirty years. The defendants, as each installment of purchase price became payable, deducted therefrom, under the law requiring such taxes to be witheld at the source, what they claimed represented plaintiff's income tax on account of such payments. The question in the case, as stated by *Pollock, C. B.* (at page 778), was:

> "The question is, whether, on the sale of an estate which professes to be for 99,000 pounds, of which a part is paid

down and part paid by installments extending over a long period of years, such installments are to be considered as an annuity or annual payment and liable to income tax."

He further said:

"There is nothing on this record to show that the property was not worth more than 99,000 pounds; nor is there anything to show that the postponement of payment was not a mere indulgence on the part of the seller. * * * These installments are payments of money due as capital; *the Act made no provision for such a case.*"

In a concurring opinion, *Baron Watson* said (at pages 784-785):

"But there is not a word in the Act that leads to the inference that a debt payable by installments is chargeable with income tax; and moreover a tax cannot be imposed by implication."

In conclusion, the appellants respectfully submit that, in the enactment of Chapter 226 of the Laws of 1923, the Legislature of Minnesota overstepped the manifest limitation upon legislative power contained in the constitutional requirement that "taxes shall be uniform upon the same class of subjects", and for that reason, as well as because in its operation it will take private property for public use without compensation, and without due process of law, and will deny to owners of mineral lands, the equal protection of the laws, Chapter 226 should be held invalid.

Frick vs. Commonwealth and other cases cited at page 41, *supra.*

THE DECREE MUST BE REVERSED OR MODIFIED.

But, even if the Act be held otherwise constitutional, it is nevertheless inapplicable

(1) To installments of purchase price received by the Sargent Land Company under the provisions of the sale contract (Exhibit 2), because such payments are not "royalties" subject to the tax sought to be created by the Act and, in so far as its terms are attempted to be enforced on account of such receipts, said constitutional safeguards will be violated; and

(2) To royalties received for ore mined prior to 1923, and to royalties due and payable prior to that year, because the Act can not reach retroactively these transactions and is not to be construed as having that intent.

This action having been brought to restrain the Sargent Land Company, its officers and agents, from reporting, or paying any taxes upon, moneys received by it by way of royalties under mining leases, or by way of installment payments of purchase price under the provisions of Exhibit *2*, it is obvious that the decree as entered in the court below can not stand, since, even if Chapter *226* be constitutional and enforcible as respects royalties, the payments of purchase price under Exhibit *2* are not subject to such taxation.

WHEREFORE, THE DECREE MUST BE REVERSED, EITHER

(1) *In toto*, with a direction to the court below that the defendant, Sargent Land Company, its officers and agents, and each of them, be restrained from reporting to the Minnesota Tax Commission royalties or moneys received by said Company as required by Sec. 3 of Chapter *226* of the Laws of 1923, and from paying any tax upon the same under or by virtue of the said Chapter *226*, or from otherwise complying with said Act or any part thereof; and that the defendants other than the said Land Company be perpetually restrained from seeking to enforce the provisions of said Chapter *226*, or any of them, against said Sargent Land Company, its officers, agents and property, as prayed in the bill of complaint (R. 10); *or*

(2) *In part*, and modified so far as to direct the entry of a decree in the District Court adjudging that the plaintiffs are entitled to the relief demanded in their bill of complaint to the extent that the defendant Sargent Land Company be perpetually restrained from reporting as royalties the moneys received by said Company under the provisions of said contract Exhibit *2*, and from paying any tax thereon pursuant to the requirements of said

Chapter 226 of the laws of 1923; and to the extent of restraining the other defendants and each of them from taking any action whatever under said Chapter 226 to assess, levy, or attempt to collect, any tax as respects said Sargent Land Company on account of the moneys received by it under said Exhibit 2; *and*

(3) *In part,* and modified so far as to direct the entry of a decree in the District Court adjudging that the plaintiffs are entitled to the relief demanded in their bill of complaint to the extent that the defendant Sargent Land Company be perpetually restrained from reporting as taxable royalties any part of the moneys received by it under any mining leases or under said Exhibit 2 for ores mined and removed thereunder prior to January 1, 1923, or any royalties or moneys received under such mining leases or said Exhibit 2, which became due and payable prior to January 1, 1923, but were thereafter paid; and that the defendants other than said Sargent Land Company be perpetually restrained from taking any action whatever under said Chapter 226 to assess, levy, or attempt to collect, any tax upon said moneys.

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OCTOBER TERM, 1925.

No. 471.

HELEN P. BARDWELL, HARRIOT P. AYER AND ALICE P. FORSMAN,

Appellants,

vs.

ARGENT LAND COMPANY, A CORPORATION; SAMUEL LORD, JAMES G. ARMSON AND ODIN HALDEN, CONSTITUTING THE MINNESOTA TAX COMMISSION; *et al.*,

Respondents.

SUPPLEMENT TO BRIEF FOR APPELLANTS.

JOHN G. MILBURN,
Of Counsel for Appellants.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

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HELEN P. BARDWELL, HARRIOT P. AYER and ALICE P. FORSMAN, Appellants,

vs.

SARGENT LAND CO., a corporation; SAMUEL LORD, JAMES G. ARMSON and ODIN HALDEN, constituting the Minnesota Tax Commission; *et al.*, Respondents.

SUPPLEMENT TO BRIEF FOR APPELLANTS.

I.

Chapter 226 of the Minnesota Laws of 1923 imposing a tax upon royalties, taken in connection with the provisions of the General Statutes of Minnesota (1913) concerning the taxation of real and personal property, constitutes double taxation in the strict legal sense.

(1) The following are the pertinent statutory provisions (R., pp. 45-47):

General Statutes of Minnesota (1913) relating to taxation:

"Section 1972. Real Property Defined. Real property, for the purposes of taxation, shall be construed to

include the land itself, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, quarries, fossils and trees on or under the same."

"Section 1974. Personal Property Defined. Personal property for the purposes of taxation shall be construed to include:

(1) All goods, chattels, moneys and effects.

* * * * * *

(6) Credits of every kind over and above debts owed by the creditor."

Section 1988, amended by Ch. 140, Laws of 1923:

"Classification of Property. All real and personal property subject to a general property tax and not subject to any gross earnings or other lieu tax is hereby classified for purposes of taxation as follows:

Class 1. Iron ore whether mined or unmined shall constitute Class 1 and shall be valued and assessed at 50% of its true and lawful value. If unmined it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located other than the ore shall be classified and assessed in accordance with the provisions of Class 3 and Class 4 as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot. * * *".

Section 2316, as amended by Ch. 102, Laws of 1923:

"Moneys and Credits. As used in this section the word 'money' means gold and silver coin, treasury notes, bank notes, and other forms of currency in common use; and the word 'credits' means and includes every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage due or to become

due, and all shares of stock in corporations the property of which is not assessed or taxed in this State.

"As hereinbefore defined, money and credits are hereby exempt from taxation other than that imposed by this Act and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof."

Chapter 226 of the Laws of 1923 (R., pp. 42-45):

"Section 1. There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine, take out and remove ore from land in this State a tax of 6%.

"Section 2. For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out or remove ore therefrom; and the word 'person' shall be construed to include individuals, copartnerships, associations, companies and corporations."

Sections 4, 5 and 6 provide for an annual report of the royalties paid and received and the assessment of the tax by the Minnesota Tax Commission.

"Section 7. Such tax shall be due and payable on the 1st day of June, 1924, and annually thereafter on the 1st day of June, and if not paid on or before that date a penalty of 10% shall immediately accrue thereon.

"Section 8. The situs of royalty for all purposes of this Act shall be in this State; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable in and to the lands for permission to explore, mine, take out and remove ore on which the royalty is paid.

"Section 13. All taxes assessed, levied and collected under the provisions of this Act shall be paid into the State Treasury and credited to the general revenue fund."

(2) Double taxation in a strict legal sense does not exist "unless the double tax is levied upon the same property within the same jurisdiction" (*Ohio Tax Cases*, 232 U. S., 576, at pp. 593, 594). This definition is elaborated in the text of Section 223 of Cooley on Taxation, 4th ed., p. 475, as follows:

> "Direct duplicate taxation, and by this is meant 'double taxation' in the strict legal sense of the term, means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid, without taxing all of it a second time; * * *".

We submit that double taxation in that sense is the result of the tax on royalties imposed by the above Act of 1923, Chapter 226.

(*a*) The statutory definition of real property for the purposes of taxation is both comprehensive and specific. (Section 1972, *supra.*) It not only covers the land and the buildings thereon, but "all rights and privileges thereto belonging or in any wise appertaining", and specifically "all mines, minerals * * * on or under the same". In the case of mineral lands it is in the main the ore underground and the rights and privileges appertaining thereto which constitute their value as the basis of taxation. In fact, the Act classifying iron ore property for taxation purposes directs that "the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot" (R. p. 46). It is through the exercise of the rights and privileges appertaining to the ore underground that the value of the ore is realized. Property consists of those rights and privileges. In *Eaton* v. *B. C. & M. R. R.*, 51 N. H. 504 (at p. 511), it is said:

> "In a strict legal sense land is not 'property' but the subject of property. The term 'property' although in common parlance frequently applied to a tract of land

or a chattel, in its legal signification 'means only the rights of the owner in relation to it'. 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing'. Selden, *J.*, in *Wynehamer* v. *The People*, 13 N. Y., 378, p. 433; 1 Blackstone's Com., 138; 2 Austin on Jurisprudence, 3rd Ed., 817, 818."

Again, at page 512, it is said:

"If the land 'in its corporeal substance and entity' is 'property', still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incident to the ownership of it."

In *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, at page 294, it is said as to the tax involved in that case:

"The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower Court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.* consumption, sale or keeping for future consumption or sale. * * * The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property."

It was conceded in that case that the tax, if a property tax, was invalid. In a note to the case (p. 291) it is said:

"If the tax in question were a property tax there would be double taxation of this property and the uniformity clause would be violated because the whisky has never been put in a separate class; *and under another statute all whisky stored in bonded warehouses was required to be assessed by the State Tax Commission at its fair cash value; and taxes at the rate of 40 cents per $100. of value were payable thereon.*" (Italics ours.)

In *Thompson* v. *Kreutzer*, 112 Miss., 165, cited in the *Dawson* case, *supra*, there is this statement of the matter:

> "Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. * * * In a strictly legal sense 'property' * * * is synonymous with the 'right of ownership' and means one's exclusive right of possessing, enjoying and disposing of a thing. * * * A tax on a thing is a tax on all its essential attributes and a tax on an essential attribute is a tax on the thing itself."

A tax on the rents and profits of land is *in effect* a tax on the land itself (see cases cited in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, pp. 589-591).

The Massachusetts tax of 6 per cent. on interest from bonds, notes, money at interest, etc. (Genl. Laws, p. 62) has been held to be a property tax. (*In re Ponsi*, 6 Fed., 2nd series, p. 324.)

Hence the Minnesota real property ad valorem tax was a tax on the essential attributes constituting the value of mineral lands; in other words, a tax on the rights and privileges of ownership therein, including the right to lease the same for the realization of the value of the ore.

(*b*) With such a tax existing there is added the taxation of royalties under Chapter 226 of the Laws of 1923. Royalties, as defined for the purposes of the Act, consist of "the amount in money received for permission to mine, take out and remove ore" from any tract of land (Sec. 2). The tax imposed is an annual tax of six per cent. upon all royalty received during the year. The nature of royalties under the customary mining lease is well settled by the Minnesota cases. They are "the rents and profits of the land" (*State* v. *Evans*, 99 Minn. 220; *Boeing* v. *Owsley*, 122 Minn. 190). It is said in *State* v. *Royal Mineral Association*, 132 Minn. 232, that "they are" (quoting the language of Lord Denman in *Queen* v. *Westbrook*, 10 Q. B. 178, 205), "the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows". Hence

there is a tax on the value of the unmined ore which consists of the right of the owner himself, or of his lessee, to bring it to the surface for sale or other disposition, and another tax, in the case of a lease, on the compensation payable to the owner by the lessee for the right to mine the ore and bring it to the surface. The value of the ore having been already taxed, to tax the owner's right to compensation for the ore when its value is realized by the operations of the lessee in bringing it to the surface is to again tax its value (*Dawson* v. *Kentucky Distilleries Co.*, 255 U. S., p. 294). The royalty tax is levied by reason of the ownership of property, or the rights incidental to such ownership and "to levy a tax by reason of ownership of property is to tax the property" (*id.*). Thus, taking the real property ad valorem tax and the royalty tax together, we submit that there is a clear case of double taxation in the strict legal sense. *State* v. *Royal Mineral Association*, *supra*, is an authority on this point. It was held in that case that to tax unaccrued royalties under a mining lease as "credits" within the meaning of the provisions of the statute for the taxation of personal property, which covers sums of money payable periodically, due or to become due, would be double taxation because "*the land, including the rents and profits, which alone give it value, has already once been taxed*".

Support is given to this view of the matter by the fact that Section 5 of Chapter 223 of the Minnesota Laws of 1921, imposing an occupation tax on persons engaged in the business of mining ores, provides, as one of the deductions from the valuation of the ore in ascertaining the amount of tax to be paid, that there shall be deducted "a percentage of the ad valorem taxes levied for said year against the realty in which the ore is deposited equal to the percentage that the tons mined or produced during such year bears to the total tonnage in the mine". This is a clear recognition of the close relation between such a tax and the ad valorem property tax; and that being true with respect to an occupation tax it is still more pertinent with respect to a tax on royalties.

II.

A sub-classification of iron ore for the sole purpose of taxing royalties and thereby imposing double taxation in the strict legal sense is a violation of the equality clause of the 14th Amendment as arbitrary, unreasonable and oppressive.

Under Section 1988 of the General Statutes of Minnesota (1913), as amended by Chapter 140 of the Laws of 1923, there is a classification of real and personal property subject to a general property tax for the purposes of taxation (R., p. 46). Iron ore is placed in Class 1 and is subjected in its valuation to the highest percentage of full value. Accepting that classification as a valid one for the purposes of this argument, a tax on royalties in the case of mining leases would be clearly unwarranted as not within the scope and purposes of the classification. In other words, it is a classification covering all iron ore mined or unmined for the purposes of property taxation without any discrimination whatsoever.

The object of Chapter 126 of the Laws of 1923 was to impose a special property tax limited in its operation to a special class, viz., those in receipt of royalties under the customary mining lease. There is no classification to warrant this unless the Act of 1923 itself is a classification, which, in view of the existing general classification, would be the creation of a sub-class. The question then arises whether it is within the rules governing classification which have the approval of this Court to sanction the creation of a sub-class for no other purpose than to impose a tax which as a property tax is clearly double taxation in the strict legal sense as has been shown. We believe that there can only be

one answer to this question, in view of the general condemnation of such double taxation as obnoxious. (*Campbell* v. *Newport*, 174 Ky., 712; *Chicago* v. *Collins*, 175 Ill., 45; *State ex rel. Koeln* v. *Improvement Co.*, 278 Mo., 310; *Gulf & Ship Island R. R. Co.* v. *Adams*, 90 Miss., 559; *Central Graneries Co.* v. *Lancaster Co.*, 77 Neb., 311; *State* v. *Northern Pacific Ry. Co.*, 130 Minn, 377. Also Cooley on Taxation, 4th ed., Sec. 225).

In *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, at p. 417, it is said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification (*Gulf, Colorado & Santa Fe Ry.*, vs. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* vs. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S., 540, 559.)"

It is not necessary to multiply cases on that subject. A classification adopted solely to support double taxation is not a classification "based upon some real and substantial distinction or bearing a reasonable and just relation to the things in respect to which such classification is imposed". This would seem to be fairly evident and not to require further elaboration. Whether a classification is valid or invalid with respect to the equality clause of the 14th Amendment is for this Court to determine, and it is not in this instance embarrassed by any ruling of the State Supreme Court sustaining such a classification. Even if there were such a ruling it would still be for this Court to determine whether the classification conforms to the requirements of the equality clause. (*Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, see p. 180.)

We purposely refrain from any discussion of the other grounds for the contention that the Act of 1923 is in violation of the equality clause of the 14th Amendment, for the reason that they are so fully covered by the other briefs before the Court in these various cases.

Respectfully submitted,

JOHN G. MILBURN,
Of Counsel for Appellants.

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WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 336.
LAKE SUPERIOR CONSOLIDATED IRON MINES, ET AL., Appellants,
vs.
SAMUEL LORD, ET AL.

No. 355.
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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

There are seven suits before the court, and the contentions of the different appellants are set forth in five briefs. The

questions raised and the arguments made in these different briefs are such that they may be most conveniently answered in this single brief for appellees.

The facts are not disputed and are fully stated by appellants.

ARGUMENT.

The law attacked in this proceeding provides that there shall be levied a tax at the rate of six per cent "upon all royalty received" during the year ending December 31, 1923, and in each year thereafter, "for permission to explore, mine, take out and remove ore from land" in Minnesota. Royalties are defined to mean

> "the amount in money or of value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom."

It was approved as Chapter 226 of the Laws of Minnesota for the year 1923, on April 11, 1923.

It is claimed that the tax so assessed violates the provisions of Section 1, Article 9, of the State Constitution and the equality and due process clauses of Section 1 of the Fourteenth Amendment of the Constitution of the United States. And it is argued on the same grounds and for the same reasons that the act comes in conflict with other provisions of the State and Federal Constitutions, but we consider that those assignments need not be separately discussed. The contention that the act takes property without due process of law is founded upon the assertion that some royalties subjected to taxation are not within the taxing jurisdiction of the state, and that contention will be separately treated. And there are questions involving the interpretation of the act which will be briefly referred to.

THE STATE HAS POWER TO TAX ROYALTIES.

The constitution of the state of Minnesota imposes no limitation on the taxing power of the state other than that expressed in the provision of Section 1, Article 9, of the State Constitution which declares that "taxes shall be uniform upon the same class of subjects." The power of taxation, in the absence of specific constitutional limitations, is thus stated by *Cooley* in his Work on Taxation (4th Ed.), Secs. 71, 72:

> "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes.
>
> Not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried even to the extent of exhaustion and destruction, thus becoming in its exercise a power to destroy.
>
> If the taxes are oppressive or unjust, the only remedy is the ballot box and the election of new representatives. Security must be found in the responsibility of the legislature that imposes the tax to the constituency which must pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, shall keep within the limits of legislative authority and violate no express provision of the constitution."

And in his *Constitutional Limitations* (7th Ed.), on page 678, Mr. Cooley says:

> "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading."

That this is the law of Minnesota is declared in the following excerpts from decisions of the Supreme Court of Minnesota:

> "The power of the legislature to tax is plenary. It is not dependent on any constitutional grant. The power to tax inheres in the state as an attribute of sovereignty, and is without limit except as restricted by the constitution."
>
> *Park v. City of Duluth*, 134 Minn. 296.

> "The power to tax inheres in the state as an attribute of sovereignty and is not dependent upon a grant of power in the constitution. Constitutional provisions relating to taxation are not grants of power, but limitations upon the exercise of a power necessarily possessed by every sovereign state. Except as restricted by such provisions, the power of the state is unlimited.
>
> The only limitation in respect to the manner or method of apportioning either taxes or assessments imposed by this constitutional provision, is that they 'shall

be uniform upon the same class of subjects.'"

State ex rel. Oliver Mining Co. v. City of Ely, 129 Minn. 40.

There can be no doubt, therefore, of the power of the legislature of the state of Minnesota to tax royalties received for mining iron ore unless the imposition of such a tax is forbidden by the uniformity provision of the State Constitution, or some applicable provision of the Federal Constitution.

THE QUESTION IS ONE OF CLASSIFICATION.

Whether a law is in violation of this provision of the State Constitution is determined under familiar rules of classification, and those rules as applied in the courts of Minnesota are precisely the same as those which govern this court in determining whether or not there is a denial of equal protection of the laws under the Fourteenth Amendment.

State ex rel. St. Paul City Ry. Co. v. Minnesota Tax Commission, 128 Minn. 384.

State v. Wells-Fargo Co., 146 Minn. 444.

This being so there can be no distinction between the attack on this law under the State Constitution and the attack on it under the equal protection clause, and a discussion of its validity under the Fourteenth Amendment will cover the contention that it is in violation of the uniformity provision of the State Constitution.

These rules of classification have been frequently stated by this court. It is unnecessary, we think, to quote from the cases. We cite a few which state the rule and its limitations in various ways:

Citizens Telephone Co. v. Fuller, 229 U. S. 322, 329, 331.

District of Columbia v. Brooke, 214 U. S. 138, 150.
Rast v. Van Deman & Lewis, 240 U. S. 342, 357.
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Armour & Co. v. Virginia, 246 U. S. 1.
Northwestern Life Ins. Co. v. Wisconsin, 247 U. S. 132, 138.

BASIS OF CLASSIFICATION.

We proceed to consider whether under the rules announced by this court in the cases referred to, the law providing for the taxation of royalties received on account of the mining of iron ore in Minnesota establishes a class of taxable objects which is forbidden by the equal protection clause of the Fourteenth Amendment.

Leasing iron ore lands in Minnesota is so prevalent and the leases are so nearly uniform that such leasing constitutes a distinct characteristic of mining there. Virtually all mining is done under leases. (Here we include "ore sales contracts" in the term "leases.") So true is this that it appeared in the record and is stated in the opinion, in *Oliver*

Iron Mining Co. v. Lord, 262 U. S. 172, 180, that in the year 1921, not a single owner was engaged in mining upon his own property. The record in the case now before the court shows that in the year 1923, the year with which we are concerned, four owners of iron ore properties engaged, under special circumstances, in removing ore from their property. Two of them mined ore as "cleaning up" processes. One of them took ore from a mine which was nearing exhaustion. The fourth operated a fee-owned property in connection with an adjoining mine held under lease (R. 55, Case No. 388). Altogether, forty-five million tons of iron ore were mined in Minnesota in 1923, and only three hundred eleven thousand tons were produced by mine owners. All other mining, more than ninety-nine per cent of it, was carried on under leases. Some mining companies paid under their leases as little as 12½ cents per ton to the mine owners while others paid as much as $1.25 per ton to them. A mine owner, therefore, participated in virtually every mining enterprise, and these owners received in 1923, out of the business of mining, amounts ranging from 12½ cents to $1.25 per ton from more than ninety-nine per cent of all the ore mined in the state. And it is to be observed that these leases were in every instance, and characteristically are, leases for long terms, corresponding, except in rare and accidental instances, with the life of the mine. Only in one respect is there a failure of the owner to receive royalties in exact accordance to the mining operation. The leases or contracts uniformly provide that if there shall be a failure to mine a minimum number of tons in any quarterly or annual period the owner shall, nevertheless, be paid a prescribed minimum amount in royalties, but the further provision is that the operator may apply such royalties to any ore, in excess of the minimum, subsequently mined. The legisla-

ture clearly could proceed on the practical and sensible assumption that this provision would not operate to work any substantial variance between ore mined and royalties received, since the self interest of the miner and conditions inhering in the mining business will bring about an exact identity.

Where a condition or practice respecting an important industry of the state is as prevalent and as permanent as leasing mining lands, and where the leases are of a uniform type, run for long periods, and provide for widely differing rates of royalty, we submit that the legislature has a right to adjust its taxing statutes to that practice. It may deal with problems of taxation in a practicable and workable way, and established methods of doing business and fixed relationships such as these may not only require legislative recognition, but they may and, we submit, they do here, justify a taxing classification which is designed to deal with divisions of interests or property which mine owners and operators have themselves made. It is not necessary that the legislature "cover the entire field of proper legislation in a single enactment" (*Middleton v. Texas Power & Light Co.*, 249 U. S. 153, *supra*). And where the field is covered by separate laws their validity will be considered in the light of their joint or concurrent operation (*Royster v. Virginia*, 253 U. S. 412).

In 1921 the Minnesota legislature adopted an act, hereinafter called the Occupation Tax Act, providing for the taxation of all persons or corporations engaged in the business of mining (Chapter 223, Laws, 1921). They were required to pay a tax equal to six per cent of the value of all ore mined. They were permitted to deduct from the value of their ore before reporting for taxation certain major mining costs. One of the principal deductible costs was the amount

paid in royalties to the owner of the land upon which mining might be carried on. At the same session of the legislature, a bill for the taxation of these royalty interests, also at the rate of six per cent, was presented, but was not reached for consideration during the session. At the 1923 session, the first thereafter held, the tax was imposed on royalties. The 1923 act completed the legislative program for imposing a tax on the business of mining. It was complementary to the Occupation Tax Act and together they operated to impose a tax upon the value of all iron ore mined in Minnesota during each year.

The legislature might have imposed a tax at a flat rate on the whole value of each ton of ore mined, and whether it called such a levy an occupation tax, a property tax, or by any other name, it would have been valid as against any objection which might have been offered under either the State or Federal Constitution (*Heisler v. Thomas Colliery Co.*, 260 U. S. 245). It might have imposed an occupation tax measured by a percentage of the value of each ton of ore mined either with or without deduction of costs of mining, and without allowing a deduction of royalties paid from any such value. The legislature, we believe, might have declared in the Occupation Tax Act that whenever payments of part of the value of ore mined, either in the form of royalties or otherwise, were made by the mine operators, to others, and were deducted from the value of the ore produced, the persons to whom such payments were made should be taxed at the same rate and in the same manner as mining companies were taxed. In any of these forms of taxation the state would have received taxes on the full taxable value of the ore produced. It was, nevertheless, recognized that although a tax at a flat rate on ore as it was mined, or a tax on the business of mining calculated on the full value of the ore

produced, would be, in law, equal and non-discriminatory, it would in truth and in fact, because of the prevailing characteristics of mining under leases, operate to impose an unequal and unjust burden upon some of those engaged in the business of mining. It would, unless there were a deduction of royalty payments, in fact operate to tax the mining companies on the owners' interest in the results of mining, which varied in the great degree which we have stated. If the legislature had the right to impose a six per cent tax on the value of iron ore as it was mined and ready for market, and if it had the right to impose a like tax on the business of mining, it must follow that, so far as classification is concerned, it had the right to impose such a tax in such a way as to make the tax payable by the persons who, regardless of mere matters of form, are part owners of the ore as it is mined or are part owners of the proceeds of the mining operation. Here lies the principal justification for taxing royalties.

Royalties received for permission to mine and market iron ore are so closely related to ore when mined that they may be separately classified for purposes of taxation, if the ore itself may be so classified. Royalties received as a result of the business of mining are so closely related to that business that they may be separately classified for the purposes of taxation, if the business of mining may be so classified.

This court held in *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, that there was no violation of the Fourteenth Amendment in the taxation of anthracite coal when mined and ready for market even though no other commodity was similarly taxed, and in *Oliver Mining Co. v. Lord*, 262 U. S. 172, this court held, sustaining the validity of the Occupation Tax Act of 1921, that there was no violation of that amendment in the taxation of the business of mining iron ore though no

other business in the state was similarly taxed. In so holding we submit it determined the principal contention in this case against appellants.

There is a further basis for the classification of royalties as a separate subject of taxation arising out of the mining situation in the state and in connection with the enforcement of the occupation tax, which alone justifies it.

There are on the iron ranges, hereafter to be mined, a total of 1,300,000,000 tons of iron ore. Approximately one-third of this (344,000,000 tons) is owned by one corporation, through subsidiaries. None of the land containing this ore is under lease. The parent corporation causes all of its mining to be carried on by another subsidiary. These owning companies may, if they see fit, lease their lands to their related operating company at royalty rates which will consume all of the value of the ore which may be mined. If there were no tax on royalties, the occupation tax could thus be evaded as to a very large part of all the iron ore of the state. We do not say that such leases have been entered into. It is sufficient to declare that the legislature was justified in framing a law under which the tax burden will be the same whether ore be mined under a lease containing a high royalty or one containing a low royalty, whether it be mined by a lessee or mined by an owner. This ground for classification has been described as one based upon "the purposes and policy of taxation," and a classification reasonably made with such an end in view is permissible.

Watson v. State Comptroller, 254 U. S. 122.

Appellants deny the validity of these grounds of classification. They say that the owner of ore land does not differ from the owner of any other land; that one who

receives royalties arising out of the operation of ore lands receives only rents or money and is in no different situation from one who receives rents or moneys from any other source; that the right or privilege of leasing ore lands or of receiving income from them does not differ from the right or privilege of leasing any other land, or of receiving income from any other source. In this they simply say that all land is alike, all commodities are alike, all activities are alike, all business is alike, and all receipts are alike. They deny that royalties have any connection with the mining of iron ore, when they are in fact inseparable. They endeavor to deny the right of classification by stripping royalties of the characteristics which clothe them and distinguish them.

It could as well have been argued in *Heisler v. Thomas Colliery Co., supra*, that owners of anthracite coal mines did not differ from owners of any other land, that the proceeds of sales of anthracite did not differ from moneys received from any other source, that the right or privilege of mining coal differed in no way from the right or privilege of making such use of other lands as might be suitable. And these arguments might have been offered—and most of them were offered—in *Oliver Mining Co. v. Lord, supra*, in opposition to the right of the state to tax the business of mining. The decisions in those cases defeat all such arguments.

If iron ore may be taxed, as it is mined, as no other commodity is taxed, and if the business of mining iron ore may be taxed as no other business or activity is taxed, certainly royalties arising out of the mining of iron ore, dependent upon, as they are, and varying with the amount of iron ore mined, may be taxed as no other receipts are taxed. Whether one who receives royalties participates in the busi-

ness of mining, and the tax on royalties may therefore properly be called an occupation tax, or whether his situation so closely resembles that of one engaged in the business of mining that the tax should be described as an excise in the nature of an occupation tax, is of no great consequence here. The Fourteenth Amendment does not command that the states impose only occupation taxes, or property taxes, or any other kind of a tax. It neither prescribes nor forbids any form of taxation. It requires only that those similarly situated be treated alike. And we submit that royalties arising out of ore lands are so closely related to iron ore and to the business of mining iron ore that their separate classification has exactly the same basis as the classification of iron ore, or the business of mining it.

THE ACT IS UNIFORM IN ITS OPERATION.

The further claims are that even though the classification of royalties for purposes of taxation be justifiable, there has been a failure to include all royalties, and that as to royalties received under iron ore leases there is inequality and discrimination in the working of the law.

It is claimed that royalties received under licenses to manufacture or sell patented articles, royalties received on account of copyrights, and royalties received under leases permitting the taking of sand, gravel or stone from lands, should have been brought within the operation of the act. It is clear that the law is not invalid because of its failure to include any of these royalties.

Heisler v. Thomas Colliery Co., 260 U. S. 245.

Oliver Mining Co. v. Lord, 262 U. S. 172.

Armour Packing Co. v. Lacy, 200 U. S. 226, 235.

Southwestern Oil Co. v. Texas, 217 U. S. 114.

And if the law is not invalid because of its failure to include receipts such as these, it must be apparent that the attempt to take from royalties the characteristics which we have described, and liken the imposition upon them to taxes on dollars, or income, or real or personal property, must fail because royalties received under gravel leases more closely resemble iron ore royalties than any other class of receipts, income, or property which may be compared with them.

It is argued that the law applies only to royalties received under leases and that royalties received under instruments which are not leases in form are not reached. The law provides for the taxation of the

> "amount in money or value of property received * * * for permission to explore, mine, take out and remove ore."

The form of the instrument is immaterial. The tax is not confined to royalties received under leases merely because virtually all royalties are received under leases.

It is said that there is discrimination in imposing a tax on royalties because the ultimate result is to tax leased ore lands without imposing any equivalent tax on ore lands which are not under lease. In the one case royalties are received and that is the occasion of the tax. In the other they are not. A somewhat similar argument was made in *Oliver Mining Co. v. Lord*, and this court met it by saying:

> "Equality does not require that unproductive mining be taxed along with productive mining."

And we may add, paraphrasing the statement of the court in that case, that the tax will be imposed when the land is leased and the ore is mined.

Another objection is that when land bearing iron ore is

sold the owner receives in a lump sum that which he might receive in royalties under a lease, and that no royalty tax is imposed upon what he receives. A similar claim is made respecting a sale of leased land by an owner, and it is repeated as to the assignment of a lease for a lump sum by a lessee. Of course the act does not apply to one not receiving royalties and is not invalid on that account any more than the occupation tax was invalid because the business of mining was conducted only on a part of the ore lands in the state. If a mine owner sells his land, or if a lessee assigns his lease, the buyer eventually will lease the land and come within the class of those who receive royalties, or he will engage in the business of mining in which event he will pay a tax at the same rate.

The assertion is made that there is discrimination in favor of those who operate mines either on their own property or under leases and against those who receive and pay taxes on royalties. We need not point out that the legislature might to some extent distinguish between those who create taxable values in a business which they actively manage and conduct, in which they may give employment to large numbers of men, and those who taking no other part in the enterprise receive a part of the wealth which is thus made available. The answer is to be found in the facts. The mining company is permitted to deduct from the value of its ore certain expenditures which are necessary in its business. The owner who receives royalties is put to no similar expense. Those specified are the cost of removing the overburden in open pit mines and of constructing shafts and drifts in underground mines, and the proportionate share of real estate taxes described in the occupation tax act. But the first of these are incident to mining, not to leasing. The argument is that the lessor may strip, or

sink shafts, before effecting a lease. There is nothing in the records showing that any of the appellants have done so. As to taxes, the record is that they are paid by the lessees; all the leases before the court, and they are typical, so provide.

Some of the appellants work this same objection into an assertion that the royalty tax law cannot be deemed complementary to the occupation tax law because of the differences stated, and because one affects a business or occupation while the other must be met by one not so engaged. We answer that regardless of forms or definitions equal tax burdens are imposed under the two laws, and the Fourteenth Amendment requires no more than that. An argument resembling this was presented in *Shaffer v. Carter*, 252 U. S. 37, 56, based specifically on the proposition:

> "That since the tax is as to citizens of Oklahoma a purely personal tax measured by their incomes, while as applied to a non-resident it is 'essentially a tax upon his property and business within the State, to which the property and business of citizens and residents of the State are not subjected,' there was a discrimination against the non-residents. We are unable to accept this reasoning. It errs in paying too much regard to theoretical distinctions and too little to the practical effect and operation of the respective taxes as levied * * *."

There are objections that the law operates unequally upon those who receive and are taxed on royalties.

One specification is that there is inequality in the tax "upon the recipients of royalties according to the depletion or capital conversion represented by their royalties." The contention is illustrated by reference to the facts in the

Merrimac Mining Company case (No. 391). The situation disclosed there was an extreme and unusual one. A mining property, which was under lease, was purchased for a price which would admit only of the return of the capital investment and interest at a low rate. But the purchase was made because of the relationship of the mine to the principal property of the company, and the relationship was the determining factor in the transaction (R. 72, Case No. 391). There is no reason to believe that ordinarily there will be any difference between owners in respect of depletion or capital conversion represented in their royalties. Any tax at a flat rate, or a fixed percentage of value, on coal or iron ore as it is mined, would be open to the same objection. Certainly such a tax is not invalid because of the failure to take into consideration the return of varying capital investments which may have made the coal or iron ore marketable.

It is claimed, too, that the law will operate unequally as between those who incur accounting, engineering and like expenses in satisfying themselves that they are receiving all the royalties due them, and those who do not audit their returns. The theory is that such expenses should be deductible from royalties received. If such expenditures are a necessary incident of collecting royalties, all are treated alike in the failure to provide that they may be deducted. If they arise merely out of a choice of business methods, then the inequality is not in the law but rests in the discretion of the taxpayer, and no inequality from a constitutional standpoint exists. It may be observed, too, that accounting and like expenses may not be deducted under the occupation tax law.

We submit that the act is a proper exercise of the state's power of classification for purposes of taxation and that it

operates equally upon all those brought within its terms.

There are a few loose ends which may briefly be touched upon before taking up the question of situs.

Appellants cite certain cases which they deem pertinent. We instance *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288; *Thompson v. Kreutzer*, 112 Miss. 165; *Thompson v. McLeod*, 112 Miss. 383; and *State v. Canda Cattle Car Co.*, 85 Minn. 457. The first of these cases came to this court with the concession that if the law imposed a property tax it was in conflict with some provision of the constitution of Kentucky. This court held the law to be one imposing a property tax. The Mississippi cases arose under constitutional provisions which strictly limited the power of the legislature on matters of taxation. And *State v. Canda Cattle Car Company* arose in Minnesota under the constitution as it stood prior to 1906; then the requirements were that

> "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state" (Art. 9, Sec. 1),

and

> "Laws shall be passed taxing * * * all real and personal property, according to its true value in money" (Art. 9, Sec. 3).

Of course no act other than one imposing the usual *ad valorem* tax could stand under such provisions.

DOUBLE TAXATION IS NOT FORBIDDEN.

And counsel cite a number of cases in which the Supreme Court of Minnesota has loosely said that double taxation

is forbidden by the constitution of the state. Some of these cases arose under the old constitution which did so operate. But there can be no question now that double taxation is no more forbidden by the uniformity provision of the State Constitution than it is by the equal protection clause of the Federal Constitution.

Double taxation, or any form of unequal taxation, is permissible if there be just basis for it.

State v. Probate Court, 145 Minn. 155, 160.

State v. Tax Commission, 136 Minn. 260, 263.

State v. Royal Mineral Association, 132 Minn. 232.

and

Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 533.

Shaffer v. Carter, 252 U. S. 37, 58.

Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 330.

LaCoste v. Louisiana, 263 U. S. 545, 552.

THERE IS NO IMPAIRMENT OF CONTRACT OBLIGATIONS.

There is the suggestion in one of the briefs for appellants that the imposition of a tax on royalties impairs the obligations of contracts. Plainly this is without merit.

Moffitt v. Kelly, 218 U. S. 401.

North Missouri R. R. Co. v. Maguire, 20 Wall. 46.

ROYALTIES RECEIVED BUT NOT EARNED IN 1923.

It is claimed in *Bardwell, et al. v. Sargent Land Co., et al.* (No. 471), that the state intends to impose the tax on royalties received in 1923 on account of ore mined and removed during the year 1922, and that it intends to tax cer-

tain delinquent royalties which, although payable in earlier years, were not received until 1923. The trial court did not attempt to interpret the law so as to determine precisely what royalties are within its operation. We do not discuss this issue because it presents a purely local question of statutory construction upon which we assume this court will not pass, although within its jurisdiction. Here, it will be taken for granted that the act will be so interpreted in the state courts as to remove any constitutional objection to it.

Situs.

The subject of the tax is within Minnesota.

Those appellants who are not residents of Minnesota and who receive outside of the state the money paid to them under their mining leases, from lessees within the state as well as from lessees without the state, attack the law on the ground that the subject of the tax has no situs in Minnesota. They contend that as to them the act attempts to impose a tax upon a subject over which the state has no jurisdiction, in violation of the due process clause of the Fourteenth Amendment, and that it deprives them of the privileges and immunities of citizens of the United States. All of their arguments depend upon a mixed question of law and fact: Has the state undertaken to reach a subject of taxation not within its borders?

They say that as to them the act cannot stand as a tax against persons not within the state, nor as a tax on money as such not within the state. We grant that it is not a tax on the person such as a poll tax, nor a tax on money as tangible property. The legislature knew that many receivers of royalty are non-residents and that much of the money

paid by lessees of mines does not physically enter the state. Its declaration that the situs of royalty shall be in Minnesota discloses that it had no intention of taxing persons outside the state, nor of taxing the dollars with which the royalty is paid.

But whatever name may be given to the tax, the subject of its incidence—whether that be land or some interest in land, or ore, or business, privilege, right, gain, profit, or whatever else—is so inseparably related to and connected with the land and the ore out of which it arises and with the mining operation that produces it that its situs is fixed and controlled by the land, the ore, and the operation.

The cases cited by appellants deal generally with the law of situs of property for purposes of taxation. The principles laid down in some of them distinctly support the state's position. None of them deny the power of the state to lay and collect a tax like the one here under consideration. The decisions to which we call the court's attention are such that we may, regardless of the nature of this tax, say that the question has in a concrete manner been determined against appellants' contention.

Two Michigan cases recognize that royalties and all other rights of the lessor in a lease of Minnesota ore lands have their situs in Minnesota and cannot be taxed elsewhere. One of these is *In re Rust's Estate*, 213 Mich. 138. There the state of Michigan attempted to impose an inheritance tax upon the royalty interest under the Rust lease, the very lease in respect of which the appellants in the Burrows case (No. 355), now before this court, are denying the jurisdiction of Minnesota. The Supreme Court of Michigan held that the situs of that lease and of the royalties to accrue thereunder was wholly in Minnesota, and that there was no property

or right or interest growing out of it which Michigan could tax because of its ownership by the Rust estate.

In *Saginaw v. Second National Bank*, 213 Mich. 590, the court again held that similar leases, together with the unaccrued royalties therein reserved and all of the estate, rights, titles, and interests specified, reserved, included in and represented thereby, were beyond the jurisdiction of the state of Michigan and, in effect, that the situs was in Minnesota.

In *State ex rel. Mariner v. Hampel*, 172 Wis. 67, the court held that the Wisconsin income tax law did not apply to the net proceeds of rentals of Michigan mines when received by Wisconsin residents. The decision is based upon an interpretation of a statute, but it illustrates the principle and policy of taxing royalties where they accrue.

In *Mt. Sterling Oil & Gas Co. v. Ratliff*, 127 Ky. 1, the court held that a non-resident corporation which had owned but had assigned an oil lease, one consideration of the assignment being that the assignee deliver to it one-sixteenth of all oil produced, was subject to taxation upon its royalty in Kentucky. Answering the contention that, since the company had parted with its leasehold and was not engaged in the production of the oil, the royalty right had its situs at the domicile of the owner, the court said:

> "The first contention is manifestly unsound. Whether the right reserved to appellant by the lease contract to one-sixteenth of the oil produced by its assignee be called personal property, a chattel real, incorporeal hereditament, or privilege, it is property and as such subject to taxation, and it is property and as such subject to taxation under Section 4030, Kentucky Statutes, 1903. * * * By the use of the words 'any coal, oil or gas privileges by leases or otherwise or any interest therein,' 'the

legislature intended to make just such an interest or privilege as appellant owns in the oil produced, or a right to a part of what may be produced by its assigns, property, and to tax it as such in the county where it is situated, the privilege exercised or the benefit received, though the owner be a non-resident of the county or of the state.' *Commonwealth v. Dunn & Co.*, 126 Ky. 108, 102 S. W. 859."

The rulings of this court are along similar lines and, in our judgment, specifically decide the question in favor of the state.

In *Rogers v. Hennepin County*, 240 U. S. 184, 191, the court upheld the right of the state of Minnesota to impose a tax upon a non-resident of Minnesota on account of his ownership of a member in the Minneapolis Chamber of Commerce. The membership was assessed as "money and credits," as defined by the Minnesota statutes. Whether the membership was properly taxed as money and credits was not considered either by the Minnesota Supreme Court or by this court. The court was first compelled to consider whether the membership was taxable property and the ruling was in the affirmative. Then came consideration of the right to tax a non-resident upon his ownership of such a membership. In sustaining the right, the following was said:

"There is the further contention with respect to the authority of the state to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicile. But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the city of Minneapolis, and, we are of the opin-

ion, applying a principle which has had recognition with respect to credits in favor of the non-residents arising from business within the state, and in the case of shares of stock of domestic corporations, that it was competent for the state to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the state where the exchange was located. *Tappan v. Merchants Bank*, 19 Wall. 490, 499; *New Orleans v. Stempel*, 175 U. S. 309, 319; *State Board v. Comptoir National*, 191 U. S. 388, 403; *Corry v. Baltimore*, 196 U. S. 466, 474; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 402; *Liverpool Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354, 355; *Hawley v. Malden*, 232 U. S. 1, 12."

In *Citizens National Bank of Cincinnati v. Durr*, 257 U. S. 99, the court held that a membership in a stock exchange might also be taxed to the owner by the state of his domicile, and declared that a property right may be of such a nature that it may have a situs in two jurisdictions at the same time. The court said:

"Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. (See *Rogers v. Hennepin County*, 240 U. S. 184, 191.) Exemption from double taxation by one and the same state is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367-368); much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both, forbidden. *Kidd v. Alabama*, 188 U. S. 730, 732; *Hawley*

v. Malden, 232 U. S. 1, 13; *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58."

In *Savings & Loan Society v. Multnomah County*, 168 U. S. 421, the court (distinguishing cases of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, and *Kirtland v. Hotchkiss*, 100 U. S. 491) upheld an Oregon statute imposing a tax upon mortgages on Oregon lands as against the objection of a non-resident mortgagee. It is true that the statute declared that the mortgage should be treated as land, but the effect of the holding is none other than to declare that a state may fix the situs of a taxable subject other than tangible personal property. The court said that a state

> "may for the purpose of taxation either treat the mortgage debt as personal property to be taxed like other choses in action to the creditor at his domicile; or treat the mortgagee's interest in the land as real estate to be taxed to him like other property at its situs."

But the controlling and decisive case is *Shaffer v. Carter*, 252 U. S. 37, particularly when read in connection with the cases which follow and amplify its rulings. In this case the court sustained the validity of an income tax law of Oklahoma which, in its application to non-residents, provided that a tax should be levied annually "upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere." The tax when delinquent became a lien on the non-resident's property. The act was assailed by a resident of Chicago in so far as it brought his income from oil lands and oil leases within the scope of its operation. The reported case discloses these facts:

> "It appears that the appellant manages his business

from his office in Chicago; devotes his time, energy and judgment to it; makes his purchases of supplies and materials, with minor exceptions, from that office, buying outside of Oklahoma and having his purchases shipped in; the contracts for the sale of oil are made by him in Chicago with non-residents of Oklahoma, and these non-residents pay him by checks drawn at their offices, outside of Oklahoma, on banks outside of that state and send the checks to him in Chicago. The actual money constituting his income is never in Oklahoma. The net income, which is all the state is attempting to tax, is never there. He does not call on the state to assist him in collecting his income, and if any of the non-residents to whom he sells oil should breach their contracts he would not call on the courts of Oklahoma for redress."

Every constitutional objection offered by appellants in this case was urged by him in his attack upon the law. We quote only a small portion of the applicable part of the opinion itself, as follows:

"In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. In well-ordered society, property has value chiefly for

what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

"That a state, consistently with the Federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Section 2 of Art. IV of the

Constitution entitled him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See *Ward v. Maryland*, 12 Wall. 418, 430."

In *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, decided at the same time as *Shaffer v. Carter*, there was a similar ruling as to the jurisdiction of the state over income or receipts of non-residents from property owned or business done by them within the state. In this case, among other things the court recognized the right of the state of New York to compel a foreign corporation, doing business within the state, to withhold from the wages or salaries of non-residents of New York working for it the income tax chargeable against such non-resident wage earners, and for that purpose to require that the wages be paid in New York rather than at one of the company's more convenient offices.

The inseparable relation between property situated within a state and the income which arises out of it is illustrated in *Gillespie v. Oklahoma*, 257 U. S. 501, where, in considering the same tax law passed upon in *Shaffer v. Carter*, the court held that there could be no taxation under that law of income arising out of leases of oil lands made by the government upon Indian lands.

And the court further makes clear its view that income from land is distinguishable from income of the person who owns land, in *Atlantic Coast Line v. Daughton*, 262 U. S. 413, 420-421. The court said:

"That a state may, consistently with the Federal Constitution, impose a tax upon the net income of prop-

> erty, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer v. Carter*, 252 U. S. 37, 44, 52. * * * It is a common provision in state income tax laws to tax the net income of property within the state which is owned, or operated, by non-residents. The differences between the parties arise, in the main, not from difference in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed."

That the tax may be made a lien upon the land mined, to the extent of the interest therein of the person to whom the royalty is payable, cannot be questioned.

Shaffer v. Carter, 252 U. S. 37, 49, 59.
Bristol v. Washington County, 177 U. S. 133.
Hodge v. Muscatine County, 196 U. S. 276, 280.

PAYMENTS MADE UNDER SARGENT LAND COMPANY CONTRACT (EXHIBIT 2) ARE ROYALTIES WITHIN THE MEANING OF THE ACT.

The appellants in the Bardwell case (No. 471) contend that the payments described in Exhibit 2 of their bill of complaint (R. 23) are not royalties and for that reason not within the operation of the act. They say that the instrument is a sale of ore in place and the payments installments of purchase price.

There are several answers to this contention, some stand-

ing on narrow grounds, and others based on reasons that are comprehensive and conclusive.

The discussion may be opened by noting that the rule in Minnesota is that tax statutes are given a construction liberal to the state in matters relating to the method of taxation and the determination of the tax, and are not to be strictly construed in favor of the taxpayer.

State v. Western Union Telegraph Co., 96 Minn. 13, 18.
State v. Crete Mining Co., 204 N. W. 932.

The act here in question defines royalty as money or property received by any person having any right, title or interest in or to any land "for permission to explore, mine, take out, or remove ore therefrom." It is what is paid to the owner of the *land* and not necessarily the owner of the *ore;* and it is not limited to payments made under leases.

Aside from the statutory definition, the term "royalty" as commonly used includes payments of the purchase price of ore in place when actually so sold. It is so used in a number of decisions dealing with such contracts.

Hosack v. Crill, 204 Pa. 97.
Sturdevant v. Thomson, 280 Pa. 233.
National Coal Co. v. Overholt, 81 W. Va. 427.
Burke Hollow Coal Co. v. Lawson, 151 Ky. 305.
Halla v. Rogers, 100 C. C. A. 263, 266.

By the terms of Exhibit 2 the Sargent Land Company "sells to the vendee all of the iron ore in, under or upon the lands above described, and every part thereof, the same to be mined and removed by the vendee on or before the expiration of fifty (50) years from the first day of January, 1918" (R. 24).

A "sale' usually denotes transfer of ownership of per-

sonal property. It may manifest an intent to convey title to real property;

> "but when the purpose of the transaction is stated the word will ordinarily have no more effect upon the title than is necessary to accomplish the purpose."
>
> *Taylor v. Burns*, 203 U. S. 120, 125.

Here the purpose of the transaction is the removal of the ore from its bed, and the effect of the contract is to permit the operator to so remove it at a stipulated price per ton.

As said in *Halla v. Rogers*, 100 C. C. A. 263, 266:

> "The owner may, on the other hand, convey the minerals upon condition that the vendee extract them by a specified time, or in a stipulated mode, or that title shall pass only when certain royalties be paid; in these instances there is no present consummated sale."

Here there is no conveyance, but at most a conditional sale; the ore must be removed within a specified time (R. 24, Art. II) and by stipulated methods (R. 27, Art. VII); and title to the ore is reserved in the owner until the "purchase price" of the ore shall have been fully paid (R. 34, Art. XIII).

It would avail appellants nothing if their claim that the Sargent Land Company has divested itself of title to the ore were true. That would mean only that the company is no longer the owner of the *ore*. It still owns the land in which the ore lies. And the statute defines royalty as payments made to the owner of the *land* for permission to mine and remove the ore.

By Exhibit 2 the landowner

> "gives and grants to the vendee the right to enter upon said lands, and any part thereof, for the purpose of exploring for, mining and removing said iron ore,"

with full authority to do thereon all things needful in the mining and treatment of the ore, including the use of the timber on the land for that purpose, and the right to erect on the unused portions of the land store buildings and houses (R. 24, Art. II).

Appellants cite Minnesota cases to the proposition that a sale of standing timber carries with it the right to go on the land to remove it. In each of those cases the instrument construed specifically granted such permission. But aside from that, since Exhibit 2 in terms grants such permission, it cannot be said that the payments to be made are consideration for the ore alone and not consideration for permission to remove it. The clause quoted is quite broad enough to invest the operator with the right to remove the ore and with title to the ore upon payment of the stipulated consideration, without resort to the "sale" clause of the contract; hence the entire consideration may well be said to be for the permission to mine and remove.

But the comprehensive and conclusive answer to the contention that payments made under Exhibit 2 are not royalties is that the relationship and rights of the parties to it are identical with those created by the ordinary mining lease that gives permission to mine and remove ore and calls for the payment of royalties.

While the instrument is in form a contract of sale of ore in place, it is in fact identical with the usual mining lease, so far as the application to it of this statute is concerned. It runs for the usual fifty-year period (R. 24, Art. II). It may be terminated by the operator at any time (R. 28, Art. XV) and by the owner in case of default (R. 35, Art. XIII, Sec. 4). Payments are measured by the tonnage removed (R. 25, Art. IV, Sec. 1). It requires the usual annual minimum advance payments (R. 25, 26, Art. IV, Sec. 3) and

provides for the application of such minimum payments to future removal of ore (R. 26, 27, Art. IV, Sec. 5). Title to each ton of ore removed remains in the owner "as security" until it is paid for (R. 34, Art. XIII, Sec. 1). The ore does not become the absolute property of the operator until it has been removed and paid for. The arrangement for payment and adjustment during the last ten years of its term (R. 26, Art. IV, Sec. 4) is not important: it amounts to nothing more than payment for the ore by the ton as it is removed. It gives the operator the right to use and occupy the surface (R. 24, Art. II). It in terms prohibits "subletting," and the operator may not assign his right or sell the ore in place (R. 30, Art. VII, Sec. 7). It specifically grants to the operator the right to enter upon the lands for the purpose of "exploring for, mining and removing" the ore (R. 24, Art. II)—and the compensation for this very thing the statute calls royalty.

The only differences between Exhibit 2 and the usual mining lease are verbal differences. The lessor is called the vendor, and royalty is called purchase price. The rights and obligations of the parties are identical with those created by a mining lease. The vendee under Exhibit 2 may do as much as and must do not less than the lessee under a mining lease. The form of the contract does not change the character of the payments made under it.

Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 421.

Whatever may have been the intention of the parties, the law must determine the character of these payments.

Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 421.

The act must, so far as its language will permit, be so

construed as to fit in logically with the taxing scheme adopted by the legislature. A consideration of that scheme makes it clear that the legislature meant to include such payments in its definition of royalty. Laws 1921, Chapter 223, imposing on mine operators a tax of six per cent of the value of the ore produced, permits them to deduct from that value royalties paid. This act rounds out the plan by imposing a tax at a like rate on the royalties. The two acts should be considered together.

Royster Guano Co. v. Virginia, 253 U. S. 412.

A comparison of this mining contract with the usual mining lease discloses no basis for permitting deduction of payments by the operator in the one case and not in the other. Nor does any reason appear why the owner of the land from which the removal of ore is permitted should be subject to a tax on royalties in the one case and not in the other.

Another answer to appellants' contention is that, since there is no difference in substance between payments made under Exhibit 2 and royalties paid under the usual mining lease, the exemption of the former from taxation would raise a grave doubt as to the validity of the act under the equal protection clause of the Federal Constitution and Section 1 of Article 9 of the State Constitution. The act will be construed so as to avoid that doubt if it be possible.

Panama R. R. Co. v. Johnson, 264 U. S. 375, 390.

The act is quite broad enough to apply to payments made under Exhibit 2. That construction removes any doubt as to constitutionality that might otherwise present itself on the ground of discrimination. And since the language of the act is susceptible of that construction the courts will so construe it.

Arkansas Gas Co. v. R. R. Commission, 261 U. S. 379, 383.

We respectfully submit that the decrees appealed from should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

Nos. 336, 355, 388, 389, 390, 391 and 471.—OCTOBER TERM, 1925.

Lake Superior Consolidated Iron Mines, Oliver Iron Mining Company, Northern Development Company, et al., Appellants,
336 *vs.*
Samuel Lord, J. G. Armson and Odin Halden, constituting the Minnesota Tax Commission, et al.

George L. Burrows, Jr., Alice B. Beaumont, Elizabeth B. Huntington, et al., etc., Appellants,
355 *vs.*
Samuel Lord, James G. Armson, Odin Halden, etc., et al.

Royal Mineral Association, North Range Iron Company, Myers Brothers Company, et al., Appellants,
388 *vs.*
Samuel Lord, James G. Armson, Odin Halden, etc., et al.

William E. Boeing, Caroline Boeing Poole, Morton D. Hull, et al., etc., Appellants,
389 *vs.*
Samuel Lord, J. G. Armson and Odin Halden, etc., et al.

Robert E. Whiteside, W. J. Conan, Eliza Conan, et al., Appellants,
390 *vs.*
Samuel Lord, James G. Armson and Odin Halden, etc., et al.

Merrimac Mining Company, Appellant,
391 *vs.*
Samuel Lord, James G. Armson and Odin Halden, etc., et al.

Helen P. Bardwell, Harriot P. Ayer and Alice P. Forsman, Appellants,
471 *vs.*
Sargent Land Company, Samuel Lord, James G. Armson, et al.

Appeals from the District Court of the United States for the District of Minnesota.

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[June 7, 1926.]

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

By their several bills in the United States District Court, appellants alleged the invalidity of Chapter 226, Laws of Minnesota,

approved April 11, 1923, because of conflict with the Fourteenth Amendment and the State Constitution. They sought to prevent its enforcement. That court held the enactment valid and, by decrees entered January 15, 1925, dismissed the bills. These appeals followed.

The challenged Act (fourteen sections), effective from its passage, provides—

> Sec. 1. There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six (6) per cent.
>
> Sec. 2. For all purposes of this Act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, co-partnerships, associations, companies and corporations.

Succeeding sections relate to reports to the Tax Commission, method of assessment, penalties, date of payment, etc. Section 5 provides: "A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received." And Section 8: "The situs of royalty for all purposes of this Act shall be in this State; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid."

Article IX, Section 1, Constitution of Minnesota: "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes . . ."

Extensive areas in northeastern Minnesota contain beds of rich iron ore and derive their chief value therefrom. Titles to these lands are held by many resident and nonresident individuals and corporations. For many years these owners have followed the

common practice of making long-term leases (ordinarily fifty years) to parties who agree to mine the ore and pay the lessor, or his successors, at some designated place, a specified amount ($.125 to $1.25), or royalty, for each ton removed. Some lessees have made subleases, reserving to themselves something above what they are obligated to pay.

Great bodies of ore are now subject to such leases, or conveyances of similar import, and every year millions of tons are mined thereunder, most of which goes out of the State. The consequent royalties are very large—sixteen million dollars during 1923.

In 1921 the Minnesota Legislature adopted the Occupation Tax Act—Chapter 223. It prescribes a charge upon those who engage in mining, amounting to six per centum of the value of the ore extracted and removed, after deducting costs of operation and royalties. *Oliver Iron Mining Co. et al.* v. *Lord*, 262 U. S. 172, sustained this Act. The Legislature evidently intended that Chapter 226, Laws of 1923, should supplement Chapter 223, Laws of 1921, and thus secure payment to the State of six per centum upon the value of all extracted ores, less the expense of raising them. If the owner operates, he must pay this six per centum, under the Occupation Tax Act; if a lessee mines, the Act requires him to pay the same amount, less royalty. The Act of 1923 lays a charge of six per centum upon the royalty. See *State* v. *Armson*, 207 N. W. 727, 731.

Appellants—corporate and individual—receive royalties from iron mines, under lease or similar contracts, at designated places, sometimes within and sometimes without the State. Some of them reside within the State, and some without. Some own the fee; some are lessees who have executed subleases. They maintain that the tax prescribed by Chapter 226 of 1923 is not laid uniformly upon the same class of subjects, as required by the State Constitution; that its enforcement would deprive them of the equal protection of the laws and of property without due process of law, contrary to the Fourteenth Amendment; and that it impairs the obligation of their contracts and thereby violates Article I, Section 10, federal Constitution.

Titles to all the lands and leases were obtained subject to the State's power to tax. If the statute now in controversy is within that power, it cannot impair the obligation of appellants' contracts;

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if beyond, it is, of course, invalid. Accordingly, there is no occasion further to discuss the application of Article I, Section 10.

The only provision of the Minnesota Constitution which undertakes to limit the power of taxation, is in Article IX, Section 1. "Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes." The State courts have said nothing to the contrary, and it seems to us sufficiently plain that this provision goes no further than the Fourteenth Amendment. Consequently, if the legislation under review does not offend that Amendment there is no conflict with the State Constitution.

In *Von Baumbach* v. *Sargent Lond Co.*, 242 U. S. 503, we considered mining leases like those now before us and pointed out that under the Minnesota decisions their avails are regarded as rents and profits of the land, "the compensation which the occupier pays the landlord for the species of occupation which the contract between them allows." Ultimate construction of Chapter 226 is for the State courts, but, in the absence of that, we think the enactment may be reasonably interpreted as laying a tax upon interests in mineral lands from which permission has been given to extract ores upon payment of royalty. The amount of the exaction is determined by reference to the sum actually received for the use of such interests.

As the tax is laid upon land, neither the owner's residence nor the place fixed for payment of the royalty is important.

The remaining question is whether the Legislature may treat ore lands as a distinct class of property and impose upon them a tax not extended to quarries, forests, etc., without depriving their owners of the equal protection of the laws guaranteed by the Fourteenth Amendment. And this question must be answered in the affirmative, under the principles announced in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, where we sustained a tax confined to anthracite coal against the objection of arbitrary classification in that bituminous coal was not included. The State Legislature may exercise wide discretion in selecting the subjects of taxation (*Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 179) so long as it refrains from clear and hostile discrimination against particular persons or classes. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237. Certainly, ores differ as much

from other products of the land as anthracite coal does from the bituminous variety, and ore gives character to appellants' holdings. Lands chiefly valuable for ore are depreciated by its extraction, and probably will yield less and less under an *ad valorem* tax as the mining continues. The situation is very different where the principal value depends on other uses which do not deplete. The selection of the business of mining only, for imposition of the occupation tax, was not arbitrary and, certainly, we cannot say that the classification by the legislation now assailed was without any reasonable basis.

There is nothing to show purpose by the State officers to insist upon a construction or application of the statute which will deprive appellants of their constitutional rights; and, considering the true construction of the Act, no ground appears which would justify an injunction to prevent them from proceeding with its orderly enforcement.

Affirmed.

A true copy.

Test

Clerk, Supreme Court, U. S.